161 U.S. 451

161 - 451

THE LAW ASSOCIATION OF PHILADELPHIA

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 119.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

NORA O'BRIEN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 13, 1892.

(15,040.)

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INDEX.

	Original.	Print.
Transcript of record from United States circuit court, district of Colorado	1	1
Caption	2	1
Complaint at law	2	1
Summons	5	5
Return of service on summons	6	6
Answer to complaint	7	7
Order: trial commenced	7	7
Order: verdict	8	8
Motion for new trial	8	8
Order: motion for new trial denied, etc.	9	9
Judgment	10	10
Stipulation extending time to file bill of exceptions	10	10
Order: time extended to file bill of exceptions	11	11
Bill of exceptions	11	11
Plaintiff's testimony	12	11
Testimony of Nora O'Brien	12	11
Albert A. McLanahan	12	12

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	Original.	Print.
Testimony of Joseph Benicke	15	14
Con. Sullivan	16	15
John Hale	18	17
William Carlan	18	17
William Hall	19	18
Thomas O'Brien	22	21
Defendant's testimony	25	23
Testimony of George Warnick	25	23
George McLane	27	25
Joshua Picciola	28	26
Plaintiff's testimony in rebuttal	28	26
Testimony of Thomas O'Brien	28	26
Mrs. O'Brien	30	28
Instructions asked by defendant	30	28
Court's instructions to jury	31	29
Exceptions by defendant	37	34
Motion for new trial	39	36
Assignment of errors	40	37
Supersedeas bond	43	39
Writ of error and clerk's return	44	40
Citation and acceptance of service	46	42
Clerk's certificate to transcript	47	43
Appearance of counsel for plaintiff in error	48	43
Appearance of counsel for defendant in error	49	44
Order of submission	50	45
Opinion of United States circuit court of appeals	51	45
Judgment of United States circuit court of appeals	62	56
Mandate to circuit court, district of Colorado	63	57
Supersedeas bond on writ of error	65	58
Original writ of error	68	59
Original citation and proof of service	70	61
Certificate of clerk to transcript	71	61

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the January session, 1892, of the October term, 1891, of the said court, begun and holden at the United States court-house, in the city of St. Louis, Missouri, in the eighth circuit, on the second Monday in January, it being the eleventh day of January, A. D. 1892, before the Honorable Henry C. Caldwell, Honorable Oliver P. Shiras, and Honorable Amos M. Thayer, judges of said court.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the 11th day of November, A. D. 1891, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Colorado, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, wherein The Union Pacific Railway Company was plaintiff in error and Nora O'Brien was defendant in error; which said transcript of record is in the words and figures following, to wit:

2 *Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.*

Be it remembered, that heretofore, and on to wit, the 15th day of January, A. D. 1891, came Nora O'Brien, by H. E. Luthe, Esq., her attorney, and filed in said court her complaint and sued out of and under the seal of said court a writ of summons against the Union Pacific Railway Company.

And the said complaint is in words and figures as follows, to wit:

Complaint.

In the Circuit Court of the United States for the District of Colorado.

NORA O'BRIEN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff complains of defendant and alleges: That defendant is and at the times hereinafter mentioned was a corporation organized and existing under and by virtue of a certain act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes; approved July 1st, A. D. 1862," and the acts

amendatory thereof, and defendant was at the times hereinafter mentioned and still is lawfully doing business within the State of Colorado.

That plaintiff is a citizen of the State of Colorado; that the amount in controversy in this action exceeds the sum of and value of two thousand dollars.

That on the fourth day of September, A. D. 1890, and for a long time prior thereto, plaintiff was the wife of the late John O'Brien, now deceased, being the same John O'Brien hereinafter mentioned, and that plaintiff and said John O'Brien had been duly married to each other and cohabited together as such husband and wife for a great number of years previous to the time of the death of said John O'Brien up to the said fourth day of September, A. D. 1890. Plaintiff further alleges that on to wit, the said fourth day of September, A. D. 1890, for a long time before and ever since, defendant was engaged in the business of a common carrier by railroad in the State of Colorado, which business was the object and purpose of its incorporation.

2½ That as such common carrier defendant by its officers, agents and servants, maintained a certain railroad track and road-bed from the city of Denver, in said State, to the city of Leadville, in the said State, and operated and run upon said road freight and passenger cars by means of locomotive engines; that on the said fourth day of September, A. D. 1890, and for some time prior thereto said John O'Brien was employed by defendant as an engineer upon said last-described railroad known as the South Park division of the said Union Pacific railroad, and that the duties of such employment consisted in running and operating a locomotive upon said road hauling freight trains.

That said John O'Brien, husband of plaintiff, was at all times in such service a skilled, careful and capable engineer, and on said day at the time of the accident hereinafter set forth, said John O'Brien was exercising great care, vigilance and prudence on the discharge of his duties as such engineer.

Plaintiff further alleges that on to wit, the morning of September 4th, A. D. 1890, at one o'clock, said John O'Brien was operating and running an engine on said road hauling a long train of freight cars (most of which were freighted) along and upon said road, running towards the said city of Denver, about one and one-half miles south of a station known as South Platte, and about twenty-eight miles from the said city of Denver.

That the region through which said railroad lay and over which said John O'Brien operated said locomotive as such engineer in the regular discharge of the duties of his said employment at the time last aforesaid, was mountainous and exceedingly dangerous to trains passing along said road, and particularly at the point last above described; a fact which was then well known to defendant. That at the point last above described on said road the road-bed of said railroad was constructed and cut through the spur of a certain hill called a foot-hill, and said road-bed lay in a deep cut; and said track through said cut run in a sharp curve with high, steep banks on

either side of said track, one of said banks being from six to eight feet high and nearly perpendicular, with but a very slight slope, the foot of said bank coming within eighteen inches of the iron rail of said track along the entire length of said curve, which said curve and cut was seventy-five feet long.

That from the summit of said bank there was and is a gradual incline or ascent up the side of the hill varying in degree up to the summit of a high range of mountains. That near the center of said curve a small gully or channel had been furrowed down from the top of said bank, down to the foot thereof by the action of waters which had flowed down from the said slope beyond, and that said channel also ran along down said slope beyond from out the said hills beyond, but that said gully was somewhat irregular
3 above said bank and quite small at the said bank, but the same lay in a slight ravine that formed a water-shed in said hills in such a manner that any danger from the flowage of water to the said track and to passing trains of cars was not perceptible to the said John O'Brien from such observation as he was able to make in passing along said track in the discharge of his duties as such engineer, and that in fact he did not know of said danger, but that defendant by the use of ordinary care and prudence in maintaining said road could have known, and plaintiff alleges that defendant did know that said place was dangerous, and that on occasions of considerable rainfall water would flow down in said gully and that sand would flow and lodge upon said track at said point.

That the nature of the soil at the point aforesaid and on the slope of the hills aforesaid is sandy and is easily carried along by the flow of water in said gully.

That on the opposite side of said railroad track, on the inside of said curve, another bank arises abruptly, and at the point opposite the mouth of said gully in said cut, which said last-named bank is slightly higher than the first-named bank, being about nine feet above the road-bed aforesaid, said bank being nearly perpendicular, and varying in height, growing less at the other end of the cut. That there was at the time of the accident hereinafter described no gutter or outlet along said track in said cut that would permit waters flowing in at said gully to flow away from said track, but such water and sand carried with it must have flowed upon said track and the sand must remain upon said track.

That there had been at some time theretofore a culvert from the point or near the point of the mouth of said gully at the said track and across the same under the road-bed, through the spur of the hill on the other side, having an outlet through which waters and sands flowing in from said gully could escape.

Plaintiff further alleges that defendant had negligently and carelessly allowed said culvert to fill and choke up so that on the said 4th day of September, A. D. 1890, said culvert would not carry off any water.

That on occasions of considerable rainfall at that locality waters in considerable quantity flowed down in said gully from the slope above in and upon said railroad track, carrying in it large quantity

of quicksand, which were deposited and remained upon said track in said cut, but that water only so flowed in at said place in times of considerable rainfall and at no other time. That said John O'Brien was not at any time aware of that fact, but that defendant did know such to be a fact at the time of said accident and before that time. That defendant negligently and carelessly allowed said railroad track to remain in such a condition without a drain
4 or outlet for waters and sands that might and did flow in from said gully upon said track and upon the rails thereof, which defendant then and long before well knew would occur at times of any considerable rainfall in that locality.

That on the night of the 3d day of September, A. D. 1890, at about 9 o'clock in the evening a rain fell in that locality and in the hills beyond, and also later in the same evening at 11 o'clock, another rainfall occurred in the same locality. That such rains caused water to flow down said gully above described from the hills and sand to be washed down in large quantities in and upon said railroad track at the point above described in said cut and curve, and caused said sand to lodge and remain upon said track and upon the rails thereof to the depth of six inches for a space of about fifteen feet along said track.

That defendant negligently and carelessly failed to cause the track at said point to be walked by some person to keep said track clear from obstructions, or to warn approaching trains of danger from such obstructions, and that said track at said point on the night aforesaid was not walked and not examined or inspected by defendant, although defendant knew at the time of the said two rains and the dangerous condition of said track in said curve.

That by reason of such negligence and carelessness of defendant in allowing said track to remain and be in such condition, and by allowing said sand to accumulate and remain upon said track, the train and locomotive operated by said John O'Brien as engineer as aforesaid, was derailed, overthrown and wrecked. That the said John O'Brien, now deceased, at the hour of 1 o'clock a. m. on the day aforesaid (being four hours after the first rain and two hours after the said second rain), while said sand so upon said track still remained on said track, approached said point running a locomotive hauling a long freight train heavily laden; that said John O'Brien at the time of running said locomotive at an ordinary rate of speed into said cut and curve was in the exercise of due care and attention in the performance of his duties as such engineer standing at the throttle of said engine with his eyes upon the track before the engine; but that from the point of entrance into said cut it was not possible for him or any one to see the point where said sand had accumulated upon said track, and when he did discover the same he attempted to stop the train, but too late. That the wheels of said locomotive struck said sand, causing the same to leave the track and turn over while John O'Brien was in the cab of said engine with his hand upon the throttle of said engine. That by said derailment of said engine said John O'Brien was bruised, mangled and then and there instantly killed.

That said John O'Brien was forty years old, of hale and hearty physique, was a highly skilled, capable and careful railroad engineer, capable of earning a salary of one hundred and twenty-five dollars per month. That said John O'Brien left him surviving plaintiff, his widow, and two infant children, the fruit of this said marriage.

That plaintiff has been damaged by the said acts and carelessness of defendant in the sum of five thousand dollars.

Wherefore, plaintiff prays judgment in the sum of five thousand dollars against the defendant, and for costs of his action.

NORA O'BRIEN, *Plaintiff*,
By H. E. LUTHE,
Her Attorney.

Indorsed: 2622. Circuit court U. S. Nora O'Brien, plaintiff *vs.* The Union Pacific Railway Company, def't. Complaint. Filed Jan 15, 1891. William A. Willard, clerk. H. E. Luthe, att'y for pl'ff.

And the said summons and proof of service is in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

NORA O'BRIEN, Plaintiff, }
vs. }
THE UNION PACIFIC RAILWAY, Defendant. }

Complaint filed in the clerk's office this 15th day of January, A. D. 1891.

The President of the United States of America to the Union Pacific Company, Greeting:

You are hereby notified that an action has been brought in said court by Nora O'Brien, plaintiff, against you as defendant to recover the sum of $5,000 damages due from you, the said defendant, to the said plaintiff by reason of the death of one John O'Brien, husband of plaintiff, by reason of an accident occurring at or near South Platte, on the line of the defendant's road between Denver and Leadville, on the 4th day of September, A. D. 1890, said O'Brien being then in the employ of defendant as a locomotive engineer, as more fully set forth and described in the complaint filed herein and to which reference is here made.

6 You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of

Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said [SEAL.] circuit court, at the city of Denver, in said district, this 15th day of January, A. D. 1891, and of the Independence of the United States the 115th year.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

JANUARY 26TH, A. D. 1891.

I hereby certify that I received the within writ on the 16th day of January, A. D. 1891, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by delivering to R. J. Duncan, general manager of the Colorado division of the Union Pacific Railway Company, personally, a true copy of the within writ, at the time and place as follows: As to R. J. Duncan, at Denver, county of Arapahoe, on the 17th day of January, A. D. 1891.

This writ, therefore, returned executed as the law directs, this 26th day of January, A. D. 1891.

A. D. JONES, *Marshal*,
By L. F. LONG,
Deputy Marshal.

Marshal's Fees.

Service 1 defendant	$2 00
Mileage, 2 miles, at 6c., going only	12
Total	$2 12

Indorsed: Gen. No. 2622. Circuit court of the United States for the district of Colorado. Nora O'Brien, plaintiff, *vs.* The Union Pacific Railway Co., defendant. Summons. Filed this 26th
7 day of January, A. D. 1891. F. W. Tupper, clerk. H. E. Luthe, of Denver, attorney for plaintiff.

And afterwards, and on to wit, the 26th day of January, A. D. 1891, came the said defendant, by Messrs. Teller & Orahood, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

Answer to Complaint.

In the Circuit Court of the United States, District of Colorado.

NORA O'BRIEN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Answer to Complaint.

Now comes said defendant, The Union Pacific Railway Company, and for answer to plaintiff's complaint herein:

Admits that it is a corporation, organized and existing under the laws of the United States, and doing business in the State of Colorado, as in said complaint alleged.

And further answering, defendant says that it denies each and every allegation in said complaint contained, except as above admitted.

TELLER & ORAHOOD,
Attorneys for Defendant.

Indorsed: No. 2622. Circuit court. Nora O'Brien *vs.* The Union Pacific Railway Company. Answer to complaint. Filed January 26th, 1891. F. W. Tupper, clerk. Teller & Orahood, attorneys for defendant.

And afterwards, and on to wit, the 25th day of May, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order, Trial.

NORA O'BRIEN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } Action for Damages.

At this day comes the said plaintiff, by H. E. Luthe, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

8 And thereupon comes a jury, to wit: R. B. Estey, Clay W. Palmer, Wm. F. Parsons, Frank Asher, Charles W. Paradice, John Green, Fred. S. Morris, E. W. Roberts, Charles E. Quincey, George Kirkbride, John Sparks, John Pendleton, twelve good and lawful men, and they are duly selected and tried, impanelled and sworn to well and truly try the matter at issue herein joined between the parties to this cause and a true verdict render according to the evidence.

And thereupon the trial is begun and continues to the hour of adjournment.

And the jurors being now each duly cautioned by the court not

to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit: the 26th day of May, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order, Trial, Verdict.

NORA O'BRIEN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2622. Action for Damages.

At this day come again the said parties by their attorneys respectively, and the said jurors now being all here present and in the jury-box, the trial herein is resumed.

And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards, on this day come again the said jurors and on their oaths do say, they find for the plaintiff in the sum of three thousand dollars.

And afterwards and on, to wit: the 1st day of June, A. D. 1891, came again the said defendant by its attorneys aforesaid, and filed in said court and in said cause its motion to set aside the verdict and for a new trial of the issues herein.

And the said motion is in words and figures as follows, to wit:

Motion for New Trial.

In the Circuit Court of the United States, District of Colorado.

9 NORA O'BRIEN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Motion for New Trial.

Now comes the said defendant herein and moves the court to set aside the verdict heretofore rendered herein and to grant a new trial, for the following reasons:

First. Because the court erred in admitting incompetent, irrelevant and immaterial testimony offered by the plaintiff against the objection of defendant.

Second. Because the court erred in refusing to admit proper, competent, material and relevant testimony offered by defendant.

Third. Because the court erred in refusing to instruct the jury as requested by defendant.

Fourth. Because the court erred in instructing the jury on its own motion.

Fifth. Because the court erred in refusing to instruct the jury to find for the defendant.

Sixth. Because the verdict is contrary to law and against the evidence.

Seventh. Because the verdict is excessive.

Eighth. Because the verdict is against the weight of the evidence.

TELLER & ORAHOOD,
Attorneys for Defendant.

Indorsed: No. 2622. Circuit court. Nora O'Brien *vs.* The Union Pacific Railway Company. Motion for new trial. Filed June 1, 1891. Robert Bailey, clerk U. S. circuit court. Teller & Orahood, attorneys for the Union Pacific Railway Company.

And afterwards, and on to wit: the 7th day of July, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied, Bill of Exceptions to be Filed within Thirty Days.

NORA O'BRIEN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2262. Action for Damages.

At this day come the said plaintiff, by H. E. Luthe, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial herein coming on now to be heared, is argued by counsel; and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, it is considered by the court that judgment be entered upon the verdict of the jury herein, in favor of the said plaintiff and against the said defendant, for the sum of three thousand dollars ($3,000) damages, and the said plaintiff's costs to be taxed.

And day until thirty days from this day is allowed the said defendant within which time to file its bill of exceptions reserved by it upon the trial of the issues herein joined.

And supersedeas bond upon writ of error will be in four thousand dollars ($4,000).

And thereupon, and on the same day, to wit: the 7th day of July, A. D. 1891, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

Judgment.

NORA O'BRIEN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2622. Action for Damages.

On the 7th day of July, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendant three thousand dollars ($3,000), her damages, by occasion of the premises in her complaint mentioned, in form aforesaid assessed, and her costs by her laid out and expended to be taxed, and have execution therefor.

And afterwards, and on to wit, the 25th day of July, A. D. 1891, came again the said plaintiff and filed in said court and in said cause a stipulation extending the time for filing the bill of exceptions.

And the said stipulation is in words and figures as follows, to wit:

Stipulation Extending Time for Filing Bill of Exceptions.

In Circuit Court of the United States, District of Colorado.

11 NORA O'BRIEN
vs.
THE UNION PACIFIC RAILWAY COMPANY. }

It is hereby stipulated that the time for filing bill of exception in above-entitled cause shall be extended until September 16th, 1891.

H. E. LUTHE,
Attorney for Plaintiff.

Indorsed: 2622. Circuit court of United States, district of Colorado. Nora O'Brien *vs.* The Union Pacific Railway Company. Stipulation extending time for filing bill of exception. Filed July 25th, 1891. Robert Bailey, clerk United States circuit court. H. E. Luthe, attorney for defendant.

And afterwards, and on to wit, the 25th day of July, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Time Extended for Filing Bill of Exceptions.

NORA O'BRIEN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2622. Action for Damages.

At this day comes the said defendant, by Willard Teller, Esq., its attorney, and on its motion and pursuant to a written stipulation thereto herein filed it is ordered by the court that the time for filing its bill of exceptions, reserved by it upon the trial herein, is hereby extended to September 16th next.

And afterwards, and on to wit: the 15th day of September, A. D. 1891, came again the said defendant by its attorneys aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, District of Colorado.

NORA O'BRIEN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 2622.

12 Be it remembered, that heretofore, to wit: on the 25th day of May, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, said cause coming on for trial before the Honorable Moses Hallett, district judge of said court, and a jury, the following proceedings were had, to wit:

The plaintiff, to maintain the issues on her part, being called as a witness, and duly sworn, gave testimony tending to show that her name was Nora O'Brien, widow of John O'Brien, deceased; that she had been married about five years, and residing in Denver about five years, and that they lived together as man and wife up to the time of the accident, having two children; that she was dependent upon the deceased for support; that O'Brien's age was 34 years, and was by occupation an engineer; he had been engaged as engineer for nine years, and seven or eight years on this road of defendant; that O'Brien was employed by the defendant as an engineer for seven or eight years, running on the South Park branch of the Union Pacific; that his wages during that time would average $160.00 to $165.00 a month; that he was in good bodily health previous to his death, and physically a strong man, capable of continuing the service as he had been doing. The death of the deceased, O'Brien, was admitted by defendant.

On cross-examination the witness stated that the deceased averaged $160.00 to $165.00 per month, perhaps more, and that he worked by the run.

The plaintiff then introduced as a witness, ALBERT A. MCLANAHAN, who testified that he resided in Denver, and that his occupation was brakeman on the Union Pacific and on the Denver, Leadville and Gunnison, the branch known as the South Park; was first employed there in December, 1888, and still working there; that he knew John O'Brien since the first month that he went on the road. That he (witness) was a brakeman upon the freight train, the same train with O'Brien; that he was thus employed two or three or four times a week during the entire period; that O'Brien was employed as a freight engineer. That on the 4th of September, 1890, he started from Como about 6 o'clock in the evening; that the deceased had a train of 23 cars, flat, coal and box, which was pretty good sized, lacking two cars of a full train, and one engine. It was a rainy night when they started; had not rained at Como; when they got to Grant it started to rain; at Grant was the first he noticed it; Grant is 23 miles this side of Como and 65 miles from Denver; from here it is a downgrade, the most of the journey in the hills until the plains are struck at Platte Cañon. It commenced to rain along about 10 o'clock at Grant—rained very hard at Grant, and rained all the way down from Grant, and the further they got down towards South Platte, the heavier it rained. At one o'clock in the morning they arrived
13 at the place of the accident—the morning of the 4th of September. The train at that time was making about ten miles an hour; the schedule time is between ten and twelve, somewhere; he did not look it up. Ten miles an hour was a moderate speed. That he saw the deceased, O'Brien, on the engine at Pine Grove; that Pine Grove was about 23 miles from the place where the train was wrecked—about two hours' drive; that it was raining at Pine Grove when they picked up some cars there, making up the train; that O'Brien was oiling his engine at that time—pretty crooked piece of road, and a very heavy downgrade—three or four let-ups between. On approaching the cut witness was in the caboose, looking out of the right-hand side window of the train, on the engineer's side. On approaching the cut the track goes around a curve—a double curve—and it curved to the left; before reaching the cut, as it enters the cut, it turns to the right; and that he could see the engine before it entered the cut about a length of the engine, probably two lengths. That there was a slight downgrade just previous to going into the cut. He observed just at the time of the engine entering the cut that steam was coming from the cylinder cocks, and steam and smoke from the stacks of the engine, indicating that deceased was working the engine, putting on steam; thinks that the engineer was using steam at the time he entered the cut; that just before entering the cut he heard the air releasing about 500, 600 or 800 feet before entering the cut, and that he is positive that the air was set and released just before entering the cut, about 800 feet away. After setting the air in releasing it there is always an escape from the cylinders in the train. He heard that it was a downgrade, and required air to keep the train from running away—more or less downgrade all the way from Pine Grove. The witness further stated

that he had been employed on the road making daily trips—from three to five trips a week—for some time, and that his duties as brakeman required him to look out for the train and see that the air was in shape, and that he was sufficiently acquainted to know what the train was doing, and to know when the air was released and put on, and that brakemen are examined in that respect before being put on the road. He saw this engine go into the cut. Witness further stated that the train gave a sudden stop, like to bumps, the first one slight—check of the motion—and the second a heavy one, one like running up against something; that at this time the engine had just about got out of sight in the cut; that the first car next to the engine was a refrigerator car, not heavily loaded, and that running into the cut they were running about ten miles an hour; that on going forward he discovered the fireman coming up the side of the cut; the engine was lying on its right side, immediately across the track; the tank was on top of the engine, and the refrigerator car was on top of the tank; he found the fireman scalded, and afterwards saw the engineer when he was taken out; that
14 at that time witness saw about eight inches of gravel and sand on the track, washed there by water into the cut; it had no escape at all to get away for an area of six or eight feet on the track, probably further; was about six or eight inches in depth, as near as he could see after the wreck was cleared up. He saw the sand on the track—what was left of it—in the middle of the track. On the side of the track, in the gutter, it was about two feet deep, on the left-hand side towards the gutter; it was a narrow gutter—one that ought to be attended to, he should think; he would call it a gutter—should suppose it to be a run more like; he examined the gutter under the track; was filled with sand about two feet deep; the sand came from the run or gulley; the gulley is fed from the side of the mountain; whenever it rains the water flows in and is bound to flow in there and go across the track; the banks are about twelve or eighteen feet; not of uniform height, higher in some places than in others; when on the train could not look over the banks; did not think could see into the cut until you got into it; could look out if you were on the top of the train when in it; there is a difference of about five feet from the top of the train and where the engineer sits; water was not flowing in the gully all the time; can probably see up the gully about twenty-five feet; no culvert to admit of the off-flow of the water; there was no gutter on the side of the track; there had been one there, but it was filled up through the cut to the edge of the ties; the lower bank opposite the gully is filled up about six feet high; could not state the length of the cut; did not know exactly how far the gully was from the beginning of the cut; it is a sharp curve in the cut, you might call it going around a corner; a number of the same kind of curves on the road.

On cross-examination the witness stated that he saw the sand deposited at the gully where it enters the cut lying on the track; could not say whether it extended all over the track or not; it was on the left-hand side and covered the rail completely to the depth

of eight inches; the right-hand side of the track was torn up; the train was run off straight into the bank when it jumped the track; the curve at that place was to the right, right at the place where the sand was found, right on the curve; there was a good opportunity to observe the depth of the sand above the rail; the gutter up there was filled with sand; was about six inches deep; it was right close to the end of the cut; the water deposited there would run into the cut and stay there; after it has raised an inch or two in the cut it would probably run east. Don't think it is downgrade through the cut for the reason they had to work steam there. The witness further stated that he did not know—he never took any measurements of the length of the curve at the place where the accident happened, but he saw the engine come into the cut, and saw that it was working steam; previous to coming into the curve he had on the brakes, which were released just as he entered the cut; he let off the brakes about 500 to 800 feet from the cut. That is what I am there for, to watch the train. The witness further stated that there was no water running over the rails unless it rained; that it was a dry run; that the pile of sand on the track was about twenty-five feet frem the entrance of the curve of the cut; from tbe formation of the track it could not be seen; the rain was a pretty good rain, but wouldn't call it a heavy rain; it was enough to wet a man while he was doing switching, but it was not raining at the time of the accident; he didn't notice how long it stopped before that.

The plaintiff introduced as a witness JOSEPH BENICKE, who stated that his occupation was a locomotive engineer on the Denver and South Park road; that he had been on since 1879, on freight; he knew John O'Brien; went up with the wrecking train at the time of the accident; got there between 5 and 6 o'clock on the morning of the 4th of September. Counsel for defendant admits that John O'Brien was killed by the overturning of the engine; that he saw the track there, and that there was sand on it; cars piled up on the engine; there was six or eight inches of sand on the track; the sand comes right on to the west end of the cut; comes out of a little gully and runs on the track when it rains at the west end of the cut, and the little gully is on the east side of track, coming on down from the slope runs down on the track; the cut is about 70 feet long he should think; pretty sharp curve; might call it a reverse curve; the lower bank towards the creek is about 10 feet high and the upper one 25 feet; slopes down pretty steep; pretty steep up above beyond the bank; it is not much of a gully there; just a little, light wash; you couldn't call it a gully, hardly; he never went up that gully to find out how it was beyond; never was off his engine there, except that morning; saw the sand lying there on the track, starting down from the gully; it is not over eight inches deep over the track for a distance of six or eight feet, the length of it; it was washed against the lower bank where it was deposited; no way for it to escape at that point; the slope is towards the entrance of the cut where the train enters; a trifle upgrade as you enter, as it is neces-

sary to use steam; if you didn't you would stall in there; couldn't see the gully but a short distance from the entrance towards the west; that is, on the east side of the track; it takes a right sharp turn there; can see it about 20 feet; should guess from 20 to 25 feet; the grade before approaching that cut was for 500 or 600 feet medium grade, not very steep; downgrade coming this way, sharp curve, and generally slack trains before striking that; was necessary to use air previous to entering the cut.

On cross-examination the witness stated that he had been running on the road since 1879 between Denver and Como; was
16 over the road three or four times a week; that he had run through sand at that place deeper than it was at the time of the wreck, but never got off the track.

Q. Is it or is it not a frequent occurrence that sand will run down on the track in these mountain roads, and that you can run through them without any danger?

A. Well, take sometimes, you will get through when the sand is soft, you will run through, and don't throw you off; you get this hard, rotten granite on the track, packed solid, and the wheels go right over it.

He didn't examine the track that morning carefully; there was no gutter at all at places alongside of the track he did examine, whether there was gutter there or not.

Q. From the depth of the sand you saw there, would you apprehend danger from running off?

A. Well, right on the sharp curve that way, I don't know; if I could stop I would stop.

Inter. Have you ever seen it of that character before, covering both rails that way? The sand extended clean across the track; both rails were covered; have seen it in the same shape a good many times; he could not stop; it was always his luck not to get off the track; no water was running in the gutter only when it rains; no culvert there.

Q. Did you notice what kind of a draw that was?

A. It ain't very deep; the way it looks to me the gully has been naturally washed down there from many rains from the top of the mountains through that flat place.

The plaintiff also introduced as a witness CON. SULLIVAN, who gave evidence showing that he is the assistant foreman on the South Park section of the road; that the accident occurred about a half mile west of South Platte station; he knows where the cut is; worked in it, and was section boss on the adjoining section last year; had worked on that section; saw the wreck on September 4th; saw some sand there but don't know how much; was fixing up the track; was there after the wreck was being taken up, and was there until it was fixed; could not tell how deep the sand was at the time; was not familiar with the cut, but was in it pretty often; as near as he could come to it, it was about 150 feet from one end to the other; a sharp curve; pretty sharp; on the upper side it was about 23 feet above the highest part, he should judge; it runs sloping out—

not very deep at either end; he knows the gully, but don't know how far it runs up into the mountains; he never examined it; might probably see 150 feet or so up it; the mouth of the gully where the water comes in on the track is pretty nearly level; not as deep as the rest of the cut; may be two feet
17 where this bar comes in higher than the bed of the track; the rock comes into the track; it raises up all the way up the mountains; don't know how far it runs back; it runs a long way; the gully is about six or seven feet wide where the sand comes in on the track, and no culvert; the bank on the opposite side of the cut is 14 or 15 feet high; the water comes in and ought to go through to the river; the place where the gully formerly went, the bank is six or seven feet high, and the water cannot go through; a gutter is along the side of the track; the end of the ties is about on a level with the bottom; there is no ditch at all; the foot of the embankment is five or six feet from the rail; the lower bank is not quite so far; that he had shoveled sand off the track at that place some years before; at that time it was about a foot and a half deep; that he was stopping the night before the accident at South Platte, about a half mile from this cut; that there was not a very heavy rain—a drizzling kind of rain in the evening, but cleared up about 9 o'clock; afterwards, about 10 or 11 o'clock, it rained; pretty heavy rain; should say it was pretty heavy; have had as heavy rains as that before; thinks it usual to have some pretty sudden and heavy showers in the hills at that place; the section boss' name was Lindstrom; he had been section boss there at that time six or seven days; the regular section boss, Andy Burke, was away; saw Lindstrom that evening before the accident, about 7 o'clock, in a saloon, and told him that it was a pretty good night to walk the track; Lindstrom didn't answer; that was about 7 o'clock.

On cross-examination, witness stated that he had seen sand on the track before at that cut, and that there are but few years that they don't have sand come in there in the heavy showers; he hadn't noticed any for that summer; the place where the gully came down is about thirty feet from the west end of the cut, a little higher where the accident occurred than it is to the west; a big body of water generally runs to the east, it being downgrade; it runs both ways; that there was no ditch or gutter there; that the gutter must have been seven or eight inches in depth, and the water runs both ways; that it was not running there at the time he talked with Lindstrom, and he didn't anticipate anything by reason of the drizzling shower; he never knew of an accident at that place before; he had shoveled out sand there before, but didn't remember how often; that is a part of his business as track-walker to shovel out the sand when he finds it on the track; the sand does come upon the track sometimes in heavy rains, and in a good many places.

On redirect examination, the witness stated that he shoveled sand off the track several times; could not tell how many times; that he had seen it about a foot and one-half deep at one time at that place; he didn't know how long it was previous to the accident; it may

have been two or three years; the track was in the same
18 condition at the time of the accident that it was then; that was a pretty heavy rain at the time spoken of; couldn't remember the time of year; the worst rains and the heaviest rains occur in July, August or September, and that had been the case ever since he had been there.

Plaintiff then introduced as a witness JOHN HALE, who gave evidence tending to show that he had lived at South Platte, and had lived there four years; was there in September last, and knows the cut where the accident happened; had seen it frequently; thinks the cut is about 120 feet long; where the water comes in, is about twenty-five feet from the upper end of it; the water and sand has to glide down over it; the bank on the lower side is about ten or twelve feet at the highest point, and then tapers off; the upper bank is considerably higher; with the exception where the ravine runs in at the upper end, there is a sag there, and that is the gulch comes down into the side of the mountain; should judge twenty-five or thirty feet from the upper end of the cut; that he knows of sand being deposited on the track from that gulley before the accident; about a year before the accident he saw it, and thinks there was about eighteen inches of sand for about sixty feet where it came over the track; that he stopped the train, witness being on the train.

On cross-examination the witness stated that the stoppage mentioned was during the rainy season; that the rainy season varies along about three months from July until September; at the time of the accident last spoken of witness stated there was no rain at all where he was at Pine Grove; when he came down he found rain below Pine Grove; Pine Grove was thirteen miles above. The witness further stated that where the sand washes in is about twenty-five feet from the upper end of the cut where the ravine comes in from the mountain; should judge the distance between the foot of the embankment and the track was three or four feet; never examined it; thinks that the water runs mostly to the east; might be some extended to the west; no culvert there, never saw one.

The plaintiff also produced as witness WILLIAM CARLAN, who gave evidence showing that he was a teamster at South Platte; that he was tending bar there; remembers this wreck; knew the section boss there; his name was Pete something; he was a Swede; saw Sullivan and Pete there that evening; Pete was playing cards; heard a conversation between Pete and Sullivan that evening about the track, Sullivan asking Pete if he was going over the track or send some one over it, to which no answer was made; that he noticed the rain that evening; a moderate rain; it was between six and eight o'clock; afterwards cleared up; that he didn't know of the wreck until the next morning; that they have pretty heavy rains in the mountain there at that time of year; the sec-
19 tion boss went away about the time of the wreck; no one knew where he went for several days after the wreck; some

one told him afterwards he had better leave the country, and witness never saw him since; knew the regular section boss, Andy Burke; Burke was away when Pete the section boss went away.

On cross-examination the witness stated that he had lived up above South Platte about four years, also at South Platte; that heavy rains were usual at that time of year; a moderate rain at South Platte, on the evening of the accident; rain occurred between six and eight o'clock; didn't remember that it rained again at eleven o'clock; that he knew nothing about this or any other accident there, and never worked on the track: Sullivan asked who he was going to send out on the track that night; don't think he said it was a good night to walk the track; witness understood Sullivan to say it was a dangerous night, and that there should be some one out on the track; couldn't give the exact language.

The plaintiff then introduced as a witness WILLIAM HALL, who testified that he had been a locomotive engineer on the South Park branch of the Union Pacific about eight years, running out of Denver to Como, 88 miles; was at the place of the accident September 4th shortly after it happened, about 3 o'clock in the morning, and remained there all that day until 7 or 8 o'clock in the evening; saw the condition of the track there; sand on the track, or where the track ought to be; it appeared to have washed from the track, but his recollection was that the track had practically all gone; you could see that the sand had been on the track, and was about six inches deep, over and above the top of the rails, and it appeared to come from an extensive gulch in the cut, and there was sand in the mouth of the gully; couldn't say whether there was any slope to the bed of the sand or not on account of its having been so badly disturbed, and couldn't tell what the former condition had been; has frequently driven an engine through that cut approaching from the west; couldn't tell how far from where the gully is that this obstruction could be seen; had never measured it, but should judge 50 feet; the length of the cut from the gully up to the west end he should think would be something like three car-lengths, or about 90 feet; should judge that the bank begins to rise about 90 feet from this point, and remains something like 15 or 20 feet high; the grade through the cut is nearly level; sometimes necessary to use steam in the cut, sometimes not; depends largely upon the condition of the train and the speed with which you approach; some trains run easier than others; this curve about a 28-degree curve, which is pretty sharp curve; 32 degrees is the sharpest curve; the grade approaching for 400 to 800 feet previous to reaching this should think to be 50 feet to the mile; not a heavy grade; would ordinarily release air about 800 feet from the cut; going down heavy grades they have to keep applying the air, which is then released in order to recharge the train; about a mile before approaching the curve the grade is not very heavy, but enough to require the moderate use of air; by releasing the air about 800 feet before striking the curve the train ordinarily goes through without using the steam, but sometimes a little steam has to be used to go

through without stalling; the cut from where the sand is to the west end is about 90 feet and about 125 feet from the east end.

On cross-examination, the witness stated that he should judge the cut to be over 200 feet in length, and gully 90 feet from the west end; by extensive gully he means that an extensive gulch is drained into the cut; the width of the gulch at the mouth narrows down to a little opening ten or twelve feet wide, but the mouth of the gulch outside of the cut is from 100 to 150 feet wide; can't tell exactly; can see a long distance up the gulch from the curve; looks as if the water would come from at least a mile back there; there may be some other ravines, though the slope generally has the appearance of coming down into this place; the gulch drains into this place, and you can see 300 feet or more standing on the engine; should think, from casual observation, that water would come from as much as 300 feet, and that he did not suppose his observation any better than the other witnesses who testified 25 to 50 feet; didn't think that the place where the gulch comes down was no more than 25 or 30 feet from the west end of the cut; he knows it is more than 25 or 30 feet from west end; that he knows this by general knowledge and observation; his attention was never called to it, and he never made an examination to see how far it was, or with reference to being a witness; the next day after the accident he was there, and helped to pick up the wreck; should think the water as likely to run one way as any other, east or west, where it comes down from the gulch near the track; the width between the bottom of the embankment and the track something like eight feet; from there it slopes off both ways, the water running lengthwise of the track; that he is still running on the road, and was running then; commenced running on the road in January, 1883; they usually have rains up there the latter part of August and September; there are a great many cuts on that road; most of the entire distance the road runs between the river and the slope of the mountain; in rainy weather, on account of the steepness of the mountain sides, more or less sand would be deposited on the track.

Q. Are the engineers all aware of that fact?

Objected to by plaintiff's counsel.

Objection sustained.

To which ruling of the court defendant, by its counsel, then and there duly excepted.

21 That during his experience witness had frequently found sand on the track in different places; that the engineer's duty, under the circumstances stated was to guard against sand, and not run through a cut of this kind without using more care than elsewhere; above the cut the track is very crooked—very little straight track—the whole road is crooked; don't think that the engine could be seen just before entering the cut from the caboose; witness had an accident at this place, at the mouth of the opening, about seven years ago, by sand being washed on the track, derailing the engine, and that there was more sand on the track at that time than there was on this occasion; it was caused by a cloud-burst; the sand on

this occasion, in witness' judgment was about six inches deep, and would ordinarily be dangerous—liable to be that amount of sand on the track at a great many places on the road, which requires a great deal of care.

On redirect examination the witness testified that in spite of care exercised by witness, his engine was derailed seven years ago; that nobody had ever spoken to him about being a witness in this case.

By Mr. TELLER:

The practice is to have some one walk the track at these dangerous places when it rained, but which was not always done; never noticed whether the locomotive could be seen from the rear end of the train or not; was more necessary to have a track-walker at night than in the day time; engineers do not depend entirely on the track-walker doing his duty, and he feels easier after meeting the track-walker; more chances of safety; the engineer takes his chances on the character of the road and the country after a rain; it requires him to be more careful; is apt to find more obstructions than in pleasant weather; expects stone and dirt on the track on a rainy day, and requires a great deal of care and attention to prevent accidents; though a man coming down a cañon with a train—it is impossible to run so slow as to be entirely safe—has got to run more or less chances.

On redirect examination witness testified that with his acquaintance of that fact he was thrown off the track at this same place seven years ago; that in some places they expected to find sand, in others rock—mostly places where the mountain is abrupt, and there is no remedy for that; has often thought that a culvert there would make the cut very much safer. Whether ordinary culvert would become obstructed depends upon the flow that could be obtained to the river, but my impression is that the culvert would add to the safety of the cut.

By Mr. TELLER:

22 Q. You said you thought the culvert would make it much safer, but is not that cut constructed there, and the water run out of it exactly as the cuts are ordinarily constructed on roads running through such places?

Objected to.

By Mr. TELLER: If other roads have constructed these in such places, it cannot be negligence on our part.

The COURT: I exclude the question.

To which ruling of the court in sustaining said objection and excluding said question, defendant, by its counsel, then and there duly excepted.

The height of the embankment on the other side is about 15 feet; the sand fills up the opening, perhaps ten feet; the distance through to the river should think to be possibly 70 feet, right opposite the opening.

Q. Now, your idea is there should have been a culvert there; you think it would have made it much safer?

A. I believe it would; yes, sir.

Q. Would not a culvert have been liable to be filled every time there was a storm there; would not the stones and debris and sand come down and fill a culvert just as quick as it commenced to rain?

A. Of course, if you build a culvert there and it becomes obstructed, the same result follows as would in this case.

Q. Would it not be bound to be obstructed if you built a culvert there of any ordinary size?

A. Well, Mr. Teller, that would depend very greatly upon the amount of flow that could be obtained. I have never taken any measurements to know what flow could be obtained from this culvert into the river, and whether it should be sufficiently filled to let the sand wash out; even if I had I am not sufficiently a civil engineer to answer that question intelligently; but my impression is the culvert would add to the safety of the cut.

Witness further stated that he never saw any evidence of a culvert under the track; if any cut was made for the purpose of a culvert it was abandoned.

The plaintiff also introduced as a witness THOMAS O'BRIEN, who testified that he resided in Denver; knew deceased, O'Brien, and knows that he was employed as an engineer on the road of
23 defendant; witness' occupation was locomotive machinist, and worked for the defendant; he was at the place of the accident on the 8th of September, and made an inspection of the track at that time; was there subsequently and took measurements on the length of the cut two weeks ago last Saturday, in company with Mr. Luthe, plaintiff's attorney; the measurements were taken with a tape-line from the west end of the cut to the gully.

Q. How many feet did it measure?

Objected to by the defendant because immaterial; objection overruled; to which ruling of the court defendant, by its counsel, then and there duly excepted.

A. It is 90 feet from the beginning of the embankment on the right side of the place where the accident occurred.

By the right side he means the right side of the engine; coming down approaching from the west on the inner side of the curve, the embankment from that point rises about ten feet, then becomes level until it comes to this cut that was once washed through there; goes down into that and up again; the highest point on the inner side of the embankment is about ten feet from the rail; it is a projection from the mountain that has been cut through.

Q. When you got to the gully, how is it there?

A. It is just a ravine washed down the mountain to strike the stream.

That the soil opposite to the gully was just as though shovelled out of the track; find sand, granite, etc.; the embankment there is about six feet; the fill beyond down towards the river is a very steep

cut from the level of the track down to the creek; from the mouth of the gully on the left side of the track if a flume was put through there and run to give it a good fall, the very furthest it would have to cut through 28 or 29 feet; it runs diagonally across the track, and where it would go directly across the track through the bank, I should think a flume of 18 or 20 feet, and that would leave an allowance for a good fall; that is from the left-hand side, the upper side of the track; the gully where the sand came is about eight feet across the top; then it tapers down to about two or three feet and about eight feet above the level of the track; the bed of the gulch is above the level of the track about three feet; took measurements of it himself; standing at the mouth of the gulch and looking in from the track you can see into that gulch probably 50, 75 or 100 feet; beyond that the mountains obstruct it; that the stream comes down, runs crooked, goes up and passes around the mountain here; walked up the gully or run about a mile; three-quarters of a mile it goes up in here, turns around, comes back again; it is entirely hidden—the mountain slopes; there is another cañon comes in here to the left; walked up to that; it is probably a mile.

24 Q. At that time, in the course of this little gully, what did you discover in respect to the nature of the soil?

A. It was all sand; it was in beds; at one point probably about three to five hundred feet from the mouth. There was one bed there of at least twenty-five feet square; that was from twelve to fourteen inches thick of this rolling decayed granite stone. The creek came right through the middle of it, where it washed the middle out, leaving the sides stand. It was probably about fourteen inches wide there. It continued up with those beds of sand, continuing right along; but that is the worst one of the lot. These beds continue right along where they have washed; stayed there.

Q. What is the nature of the soil on the slope?

A. All decayed granite; rolling small stone, probably half the size of your finger.

Q. Is there anything else besides stones in the soil?

A. It is all gravel; fine granite.

Q. Is there any sand?

A. Sand and gravel; yes.

Q. Was there any water coming down at that time?

A. Yes, sir.

Q. Had it been raining that day?

A. Not to any appearance; no, sir.

That distance from the rail to the foot of the bank on the inside of the cut was three feet; he took measurements there opposite the side of the bank, and the cut in its entire length is about 200 feet; the beginning of the bank to where the accident occurred was about 90 feet; it is further from there to the other end; witness was there four days after the accident; they had not cleared up the wreck then.

On cross-examination, the witness testified that he could state positively the distance from the commencement of the curve to where the accident happened was 90 feet; he measured it;

didn't measure the whole distance of the entire cut; measured first from the coming in the cut to where the accident occurred; that was 90 feet; measured on the upper end left-hand side on entering the cut, and it was 90 feet; the grade in the cut appeared to be level; the water didn't appear to be running either way; it came down out of the cut, and the sand had washed both ways; it didn't wash in any length at all; not indicating that water ran both ways, where it washed in, it would be highest below; on the upper side, a space between where the embankment came down was four or five feet, and on the other side was three feet; he measured both.

On redirect examination the witness testified:

Q. State on what side of the track you made the measurement of 90 feet to the gully, going east?

A. On the right side.

25 Q. That is on the inner side of the curve?

A. Yes, sir; it was what I term a horseshoe curve.

Q. That is the next side to the river, you mean? (Question by Mr. Teller.)

A. The next side to the river. The curve comes in here (showing); I measured in there. My idea was to get the engineer's view; the right side of the engine.

Q. Did you measure the other side of it, the length of it?

A. No, sir.

Q. Would that be greater or less than the lower side?

A. I should not think it would be any greater.

Q. It would be less?

A. Not much less.

Q. You measured the outside of the curve, or inside?

A. I measured the inside of the curve.

Thereupon the plaintiff rested.

And thereupon the defendant, to maintain the issues on its part, called as a witness GEORGE WARNICK, who testified that he lived in Denver; is a locomotive fireman, and was in September, 1890; was on the train with deceased on September 4th, 1890; it was a bad night most of the time, but was not raining at the place of the accident; most of the time was raining at Grant, some of the time very hard about 37 miles from Grant, where this accident happened, the schedule time being about three hours' run; was firing on the train with O'Brien, and was at the time of the accident; they were coming along there in the neighborhood of 9 to 11 miles an hour came into the cut, struck the sand and the engine went over; witness saw the sand 30 or 40 feet away—was sitting on his side—got back on the tank deck, and, as the engine struck, he jumped, and the engine turned over at the same time, throwing him against a rock, where he lost consciousness; after regaining consciousness, a brakeman came along and helped him back to the baggage car, and stayed with him until the doctor came; called O'Brien's name four or five times, but got no response; he apprehended that the sand would be dangerous, and for that reason he ran backwards; O'Brien

at the time was sitting on his side; he made no effort to get out or put on the air or reverse the engine; was sitting with his head down, impression that he was asleep; could only see one rail and the sand on that side; good headlight was burning at the time; in getting into the cut couldn't see the sand for more than 50 feet; didn't examine the depth of the sand; was unconscious most of the time; afterwards was laid up nearly three months; knew O'Brien about November 1st, 1889, and, as near as can recollect, began firing for him about November 5th, 1889, and fired for him continuously ever since, except a few times when he was laid off; was running over the same road with him all the time; frequently found
26 sand on the track; that night they found sand just below Dawson's; about three inches, about a foot wide, across the track—it wasn't dangerous, and they didn't slow up for it; the road runs constantly through cuts and along the base of mountains all the way from Platte Cañon to Estabrook; from there it is level to Grant—should judge it would be 35 miles from Platte Cañon to Estabrook—runs a great part of the way between the mountains and the river; the cañon is generally very narrow, and there are a great many cuts; these trains run on regular schedule time—we were a little behind time.

On cross-examination, the witness stated that 12 miles an hour was schedule time; at the time of the accident they were running 10 or 11 miles; he had put in fire about a half mile from where the accident occurred; the brakeman was on the engine; he stayed on the right-hand side, on the engineer's side; O'Brien sat with his head down from the time he put in the fire; don't know whether he was that way before he put in the fire or not; didn't look at him very long; it was about three or four minutes after he was holding his head down that the accident happened; just before entering the cut O'Brien had his head down; the distance from the seat to the end of the cab is about two feet; witness saw the inevitable wreck; was pretty excited, and took special pains to see what O'Brien was doing; the track was slightly downgrade; just entering the cut; coming to the place where the accident occurred, the grade is about level; about there the rise is gradual; not necessary to use steam in going through there; the air was left off at a little house on the corner of the curve; the time they left the air off until they came to the cut was about two minutes; about a fifth of a mile from the cut; don't know whether the engineer was awake when he released the air or not; the air has been released when a person was asleep; that O'Brien went to sleep. Did you have conversation with Thomas O'Brien at U. P. hospital on Sunday following accident, about this accident? Didn't remember talking with him at the hospital, but saw him there; didn't have any conversation with O'Brien the first time, as he wasn't in condition to talk; that he (O'Brien) didn't ask, "George, are you in a condition to talk?" witness had been taking morphine and was suffering all the time; don't remember that O'Brien said, "I want to ask you a question," and don't remember him saying, "George, how did that accident happen; were either one of you to blame for this accident?" nor his answering, "No,

sir; we were both attending to our business," and that he was not asked by O'Brien, "Have you got anything to censure yourself for in respect to this accident?" or "Were either of you to blame for the accident?" That this language was not used in the second conversation when Mrs. O'Brien was present.

Q. Did you not have a conversation with Mrs. O'Brien and Mr. O'Brien?

27 A. They came there and staid a few minutes; what passed I don't remember; I don't remember whether it was on the 17th.

Did not remember whether O'Brien asked him in presence of Mrs. O'Brien how the accident happened; not to his knowledge.

Had no conversation at all with O'Brien the first time the doctor had just dressed; my elbows were scalded so I could not talk at all.

Had a conversation with O'Brien a few days since. Did not say anything to him then about O'Brien being asleep; he did not ask me.

O'Brien talked it over a few days since, but witness had nothing to say about it, and didn't say anything to O'Brien about John O'Brien being asleep; am still in the employ of defendant; at the time of the accident O'Brien was not using steam; witness could not see his eyes, as his face was turned toward the window.

On redirect examination witness stated that he didn't remember exactly how long he was in the hospital; Dr. Lyman attended him; his injuries were scalds.

The defendant also introduced as a witness GEORGE MCLANE, who testified that his business was a railroad conductor and brakeman, and he was conductor on the train on which O'Brien was killed; had been working there from September, 1888, to February, 1890; not now working there; they often found sand on the track, and witness agrees with most of the other witnesses who have testified in regard to the road running close to the mountains, cuts, etc.; that it was a matter of frequent occurrence after rains to find sand on the track; the duty of the engineer under such circumstances was to run carefully and look out; had two brakemen on the train that night; witness at the time of the accident was in the caboose; didn't know whether McClanahan looked out the window at the time or not; he (McClanahan) was on the right-hand side of the caboose; witness was not paying any attention to him; he was asleep between Dome Rock and Muldoon's, a half mile from where the accident happened, but don't know whether he was asleep after that or not; that he examined the place where the accident happened, and the sand on the track was five or six inches deep and extended ten or twelve feet, probably; he couldn't tell much about it; couldn't tell very well on account of a small gutter there about two feet wide at the bottom; the distance from the end of the cut to where the locomotive left the track he should think would be twenty-five to thirty feet; couldn't say which way the water would run there; nearly level, if anything; the grade runs east; couldn't say as to whether

water would run both ways or not; didn't examine with reference to that.

On cross-examination, the witness testified that he didn't notice whether the water would run either way or not; never saw
28 any water there at all, only his opinion as to how the water would run; just before the accident he was looking out of the window on the left-hand side; didn't know whether McClanahan was looking out of the right-hand side or not; didn't see him; about that time was reclining in a half upright position, taking it easy; witness was not doing that way, but was looking out of the window.

The defendant, to further maintain the issues on its part, called the witness JOSHUA PICCIOLI, who had been sworn by the plaintiff, who testified that he was at the place where the accident happened about 6.10 in the morning, and stayed there until about 5.45 o'clock that night, until they got the engine picked up on the side so they could get by with a train; examined to see what caused the accident, and found five or six inches of sand lying there, which extended over about twenty feet of track, clear across the track; the width between where the gulch came down and the track was about three feet on the upper side, and about two and one-half or three feet on the lower side; the ground in the cut is high in the center, and slopes both ways; couldn't say as to whether water would run both ways on the track or not; never saw any there; didn't observe whether there was a slight rise in the track from the west end coming up the gulch, but should judge the track to be very nearly level there; has been railroading since 1869, and on the South Park since 1881; are a good many cuts and loose formations on the road between Grant and Platte Station; should judge it to be dangerous; has not been over it enough to observe whether sand is frequently deposited by the rains.

Thereupon the defendant rested.

The plaintiff then called as a witness in rebuttal THOMAS O'BRIEN, who stated in regard to seeing George Warnick at the Union Pacific hospital on Sunday following the accident, and asked Warnick the question:

Q. Did you ask him the question, "George, are you in a condition to talk?"

A. Yes, sir.

Q. Did he say "Yes" to that?

A. Yes, sir.

To both of which questions the defendant, by its counsel, then and there objected; but the court overruled such objection, to which ruling defendant, by its counsel, then and there duly excepted.

Witness asked Warnick, "I want to ask you whether either one of you were to blame for the accident, or have you anything to censure yourself for?"

Did he answer: "We were not to blame, either one of us?"

A. Yes.

That Warnick didn't say in exactly this language: "The company is to blame for this, and they ought to be made to pay for it." Witness saw Warnick shortly afterwards at the hospital, when Mrs. O'Brien was present, and that he again asked Warnick:

"Now, George, was there anything in this matter of causing this accident, for which either one of you were to blame?"

A. Yes.

Q. Did he then say "No"?

A. He said no.

To which question the defendant objected as leading; but the court overruled said objection, to which ruling, the defendant, by its counsel, then and there duly excepted.

That she asked Warnick whether any one said anything.

Q. Did he say, "No, we did not have time to say anything" till the train struck?

A. Yes.

Objected to for the above reason; but the court overruled said objection, to which ruling the defendant, by its counsel, then and there duly excepted.

On cross-examination witness stated that he thought Warnick was all right; he was in bed with his arm and part of his face covered with bandages; that Warnick's brother, Dr. Warnick, was also present; Warnick introduced me to his brother, Dr. Warnick; he was of sensible mind to do that; witness stayed there probably 15 minutes, and that the questions put and answers given were as stated in the direct examination; this was three days after the accident; was trying to see if his brother was to blame for anything; he didn't apprehend that Warnick was likely to die there; that he went there from natural instincts, that would bring a brother to see if there was anything wrong; supposed that he had to find out if there was anything they could censure themselves with; that he went to see him again; that the foregoing questions were put to him, and that he remembers just about what they were; that he asked Warnick: "George, if there is anything wrong I want you to tell if you are to blame; it don't make any difference whether you tell it to anybody else, but for Heaven's sake tell it to me." And the answer was: "No, Tom, give it to the railroad company; I will make them jump when I get out of bed." The second time, on the 17th of the month, Mrs. O'Brien and I went up. The remark about making them jump was the first time witness was at the hospital; that he wasn't satisfied with what Warnick said the first time, and that it is a known fact that railroad companies will tamper with witnesses, and that he knows this from his railroad experience; that the railroad company never tampered with him—

30 never had any occasion to—that is the reason he went to see him at the hospital; that he went the second time to see if

the two stories would correspond, and that he asked him the third time in the U. P. shops; Warnick denies he ever said these things. Witness quit the road as soon as his brother was killed, after he had seen the way the case went on and what he had heard—he was making the claim in behalf of the widow and two children—that he would either have to quit or the company would blackball him; that he made up his mind to sue the company and quit; has taken a good deal of interest in this suit, but only as a brother. It was this brother that acted as a father to me—raised me from childhood—no wonder I would take to him. The second time he went to the hospital Warnick was in bed—appeared to be very cheerful, but was not able to be up. And the first time he saw him he appeared to be all right and intelligent.

Plaintiff also called as a witness in rebuttal, Mrs. O'BRIEN, who testified that she went to the hospital with O'Brien on or about the 17th of September, and saw Warnick; the conversation between O'Brien and Warnick was in her presence. That O'Brien asked Warnick if they were to blame for anything and he said no; witness could not say what was said for she cried, but remembered that she asked if her husband did anything, or did he have a moment to get out, which was all she said, and Warnick answered they never knew what hit them until they were right in the wreck; this is all she remembers saying; that she felt so bad she cried and asked him no more.

The above and foregoing was in substance all the testimony given on the trial of said cause.

(This bill correctly states the substance of the testimony.)

H. E. LUTHE,
Att'y for Pl'ff.

And thereupon the defendant asked the court to instruct the jury as follows, to wit:

No. 1.

The court is asked to instruct the jury that the burden of proof is upon the plaintiff to show that the accident occurred by reason of the negligence of the defendants, and that the plaintiff was in the exercise of due care at the time of the accident, and that due care in such a case required of the deceased that he be vigilant and watchful to avoid such danger as his experience of the road must have made him aware he must expect in such places as the place where the accident occurred and under the circumstances detailed by the witnesses, to wit: at time when heavy rains had been met with, and that there has been offered no evidence whatever upon that point by the plaintiff, not even a reputation for care, but
31 there has been evidence offered by defendant that he was not in the exercise of due care; nor has there been any evidence offered as to whether if the sand had been discovered at the time it

might have been discovered he could or could not have applied the air in time to prevent the accident.

Asked by defendant.

No. 2.

The court is asked to instruct the jury that a party taking employment as an engineer in running a locomotive assumes the risks that are incident to the employment and to the running of locomotives over the roads operated by his employer, and if the jury believe that the country through which this road ran and its location was such that sand was frequently deposited on the track, then the deposit of sand on the track when heavy rains occurred must be taken as one of the ordinary risks of his employment, and the duty of the engineer was to be vigilant in avoiding it; and if the jury believe that the lack of such vigilance on the part of the deceased contributed to the accident, then the plaintiff cannot recover.

Asked for by defendant.

No. 3.

The court is asked to instruct the jury that the duty that an employer owes to the employé is to exercise ordinary care in providing the employé a safe place in which to work, and what is ordinary care is such care as men of ordinary prudence use in similar circumstances in the same employment.

Asked for by defendant.

No. 4.

The court is asked to instruct the jury that there is no evidence to show that the construction of a culvert at the place where the accident happened would have avoided or would probably have avoided the accident.

But the court refused to give said instructions; to which refusal of the court to give each and every of said instructions, defendant, by its counsel, then and there duly excepted.

Thereupon the court instructed the jury as follows:

The rules to be applied in determining this controversy, gentlemen, are applicable to all cases in which a person in service may have a right of action against his employer. The circumstance that defendant is a railroad company does not distinguish the case from others of the same class. In general, a person who receives an injury while in the service of another has no right of action
32 against his employer for such injury. It is only when the person employing him has omitted some duty—failed in something enjoined upon him by the law—that any such right arises. And this right arises only when the person injured is in the discharge of his duty to the extent that it may be said that he is free from fault. (The person injured must be without fault, and the employer must be in fault, before any right of action can exist.) So in all these cases there is a double aspect. It is first to be ascertained

whether the person injured was in any way negligent; and secondly, whether the employer was negligent in a manner which caused the injury. These features must co-exist; the person employed must be without fault, the other must be in fault. If the employer had been in fault, and the other has been negligent also, there is no right of action.

And in this instance, upon the circumstance developed by the evidence, it is especially necessary to consider first, and decide whether this man who lost his life was in fault at the time of the accident (there is some evidence tending to show that storms in the region of country traversed by this railroad are of frequent occurrence in the fall season of the year, and with the effect often to bring down upon the track considerable quantities of sand and gravel;) so that, with a storm prevailing at and before the time of the accident, the circumstances were such as to make it reasonable to expect that some such thing would occur as did in fact occur, in respect to washing down gravel and sand upon the track; and this made it the duty of the engineer to look out for these things very carefully. It was necessary for him, under all the circumstances, to be especially upon his guard in order to avoid injury to his train and to himself. And there is evidence tending to show that he was not in that attitude at the time of the accident. You remember that the fireman who was with him upon the engine states that at the time of the accident he was of the impression that the engineer was asleep. He cannot state this with certainty, only from the position in which he sat, and from his attitude at the time. Now, if that be true there can be no right of action in the plaintiff here for his death, because all the circumstances required him to be vigilant and attentive to his duties in the place in which he was put. If he had been awake, and looking out for obstructions upon the track, it might be that he would have seen this obstruction in time to stop, or at any rate to check the train so that the engine would not have been overturned, and thus the injury would not have resulted.

There is not much before you to show how quickly the train might have been checked at the rate of speed at which it was going and upon the grade at that place; but it is fair to assume that, with any sort of activity on his part, if the obstruction had been seen the train might have been very much retarded in the course of
33 fifty or one hundred feet, so that it would not have come upon the sand with any great degree of force. An attack was made upon the fireman who testified to these circumstances, by testimony to the effect that he had made other statements soon after the accident, and when he was in the hospital. This was with a view to affect his credibility before you, and to induce you to discredit him. Of course, the weight of his testimony is entirely for your consideration, and you are to say whether you will accept his statements; considering his position, the circumstances as related by him, and his means of observation, what the value of his testimony shall be. (What I have to say to you in that connection is, that if you believe that at the time of the accident, or at the time

when the train came in view of the place where the sand was upon the track, the engineer was in fact asleep and inattentive to his duties, there is no right of action on the part of the plaintiff here, for the reason that this would be contributory negligence upon his part, and the fault would be his own.

Now, if you determine that matter against the defendant, if you say that the deceased was in full performance of his duty, and was as active and attentive to his duties at that time as the circumstances required, then the question arises as to the defendant's negligence, and upon that some question has arisen between the parties as to whether it was the duty of the company to patrol the track at and before the time of the accident, a storm having developed in the early part of the evening, and having prevailed for some time. It has been a matter of discussion before you; something was said about it in evidence whether it was the duty of the company to have some one out to watch the track; as to the general duty resting upon the company in that behalf there is nothing in the testimony, and so you cannot say that there was any general duty to that effect; but one witness—I think his name was Sullivan—testified that he put some question to the man who was section boss at some time during the evening, probably about seven or eight o'clock, before the accident occurred, as to whether he was going to do this, saying something to him to the effect that this would be a good night to walk the track. (From that it may be a fair inference that it was the practice of the company to have men out on such nights to walk the track and to see whether there were obstructions upon it.) If that be true the negligence of the section boss or of any of his men in that respect would be the negligence of other servants of the company, upon which deceased would have no right of action. It is a rule in this class of actions, that when the accident proceeds from the negligence of fellow-servants, those who are immediately associated with the person injured, in the discharge of his duties, there is no right of action on the part of the person injured for such negligence. And if it be true that it was the practice of the section men and of the section boss to patrol the track under the
34 circumstances detailed in testimony, you cannot proceed upon that in respect to your verdict; that is to say, you cannot charge the defendant company with negligence in respect to that matter.

There is, however, another matter which stands in a different attitude, and that is as to the construction of the road at the place where the accident occurred. There is testimony to show that the road at that place was built across the mouth of the gulch or draw, and if I understand the testimony well, about upon the same level, as the mouth of the draw, and that the gap which was made by the draw below the track and towards the river on the right-hand side coming this way, was closed up by the earth taken from the cut or perhaps by the sand which had washed down; and it would seem from all of the circumstances detailed in evidence, that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which

the sand might have washed out towards the river, and in that manner obstruction might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think from all that is stated before you, it is fairly open to this construction. Of course, that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track, and upon the quantity of sand and gravel coming down through the gulch; but looking into all the circumstances as well as you can understand them from the testimony, if you are of the opinion that the track might have been built in this way with reasonable expense, and so as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place. It seems from the testimony that this track had been obstructed several times; I do not recall just now how often this time, so that there was enough in the circumstances to call the attention of the company to the fact that there was danger from this source.

It is true, that in building its road, and as a matter of duty towards persons in its service, the company is only required to exercise ordinary diligence and care; such care and diligence as men usually bestow upon business of the like nature; so that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns.

Then the question will be in your minds, whether the road at this place was built with ordinary care and diligence with a view to the protection of the lives of persons in the service of the company.

The rule is different when it comes to the case of a passenger; a passenger who is injured may complain of almost anything as a defect in the road and its structure, showing negligence on the part of the company.

But in respect to persons who are employed by the company, the rule is somewhat different; that is to say, there is a less degree of care and diligence required of the company in respect to the servants of the company than is required in respect to persons traveling on the road in the capacity of passengers.

So, then, gentlemen, if you are able to relieve the deceased, in respect to saying that he was in the fulfillment of his duty, was performing well the duty which was required of him on the occasion, and that the company is negligent in respect to the manner of constructing its road, you may be able to find a verdict for plaintiff; otherwise for the defendant.

Now as to the right of action. At the common law there was no right upon decease of the person injured; it was only when the injury fell short of death, when it was only such as to disable the person, that there was a right of action on the part of the person injured against his employer.

But a statute of this State gives to certain survivors of deceased, in case of death, the right of action, and in this case the widow is

the person to sue for it. The extent of the damages, if you find for the plaintiff, is mentioned in this statute.

"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured."

And then in the next section the statute says that the jury shall "give such damages as they may deem fair and just, not exceeding five thousand dollars with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."

That is to say, the jury may have regard to the degree of negligence which they may impute to the defendant; the mitigating or aggravating circumstances as mentioned in the statute. If they regard it as a case of gross negligence or very great negligence, they may return larger damages than if it is a case of very ordinary neglect.

36 In any case, it is only the probable earnings of deceased which can be recovered, that is to say, considering his style of living and the probable duration of his life, the earnings which he could make in the course of his life. This man was earning, it is said, from sixty to sixty-five dollars a month; he was in good health and in the prime of life; thirty-four years old, I believe, it is said, and you are to consider the circumstances in making up the amount of your verdict if you find for him.

Mr. LUTHE: I think the evidence shows it was $165 instead of $65. The testimony of the woman is $165, and that is what they do receive on that road.

The COURT: I understood the witness to say $65.

Mr. TELLER: That is the way the woman stated; I would have been prepared to show that no engineer received such wages.

The COURT: Gentlemen, your attention is called to the matter; I suppose you can settle that.

Mr. WILLARD TELLER: I would like to ask specially referring to the question of this culvert; I would like to have the court charge the jury that there is no evidence except that of Mr. Hall in respect to whether a culvert would be safer or not, and that is an opinion of his, that he thought it would be safer, that is the only evidence in respect to it.

The COURT: I believe that is true; I think that he is the only witness who testified in that way; I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters; that is to say, having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by the witnesses, you as men of some knowledge of affairs, may determine in your own

minds quite independently of Mr. Hall's testimony whether it was practicable to make a culvert there with reasonable cost, which would have the effect to carry away the sand and gravel so it would not be an obstruction; I believe they testify to some rock coming down in the sand; whether it would carry it away so it would not be an obstruction upon the track.

Mr. TELLER: I ask further that your honor will charge the jury that if under the evidence here given, if the deceased himself, if he *he* had survived would not have been able to sustain an action against the company, then this action cannot be sustained; that the test of the right is——

The COURT: That is the way the statute puts it, gentlemen; it is that the survivors may have a right of action when the deceased would have had such right if he had lived; so that the
37 question really is whether Mr. O'Brien, if he had survived the accident, could have maintained an action for it; counsel is correct in that proposition.

Mr. LUTHE: I ask an instruction under the other section; they must bring in a verdict for three thousand dollars if they find for the plaintiff at all.

The COURT: That I decline to give, because we have often decided that section does not cover the case of employés.

Verdict.

3.37 P. M.

"We, the jury, find a verdict for plaintiff in the sum of three thousand dollars."

Mr. Teller gives notice of a motion for new trial.

Thereupon defendant, by its counsel, excepted to that part of said instructions which reads as follows:

"There is, however, another matter which stands in a different attitude, and that is as to the construction of the road at the place where the accident occurred. There is testimony to show that the road at that place was built across the mouth of the gulch or draw, and if I understand the testimony well about upon the same level as the mouth of the draw, and that the gap which was made by the draw below the track and towards the river on the right-hand side coming this way was closed up by the earth taken from the cut or perhaps by the sand which had washed down; and it would seem from all of the circumstances detailed in evidence that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which the sand might have washed out towards the river, and in that manner obstruction might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think, from all that is stated before you, it is fairly open to this construction. Of course, that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track, and upon the quantity of sand and gravel coming down through the gulch; but look into all the circumstances

as well as you can understand them from the testimony, if you are of the opinion that the track might have been built this way, with reasonable expense, and so as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place. It seems from the testimony that this track has been obstructed several times; I do not recall just how often before this time, so that there was enough in the circumstances to call the attention of the company to the fact that there was danger from this course.

38 It is true that in building its road and as a matter of duty towards persons in its service, the company is only required to exercise ordinary diligence and care, such care and diligence as men usually bestow upon business of the like nature; that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns.

Then the question will be in your minds whether the road at this place was built with ordinary care and diligence with a view to the protection of the lives of persons in the service of the company.

The rule is different when it comes to the case of a passenger; a passenger who is injured may complain of almost anything as a defect in the road and its structure, showing negligence on the part of the company.

But in respect to persons who are employed by the company the rule is somewhat different—that is to say, there is a less degree of care and diligence required of the company in respect to the servants of the company than is required in respect to persons traveling on the road in the capacity of passengers.

So then, gentlemen, if you are able to relieve the deceased in respect to saying that he was in the fulfillment of his duty, was performing well the duty which was required of him on the occasion, and that the company is negligent in respect to the manner of constructing its road, you may be able to find a verdict for plaintiff; otherwise, for the defendant."

Also:

"Mr. WILLARD TELLER: I would like to ask specially referring to the question of this culvert. I would like to have the court charge the jury that there is no evidence, except that of Mr. Hall, in respect to whether a culvert would be safer or not, and that is an opinion of his, that he thought it would be safer; that is the only evidence in respect to it.

The COURT: I believe that is true: I think that he is the only witness who testified in that way. I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters—that is to say, having regard to the testimony before you, the situation of the road, and the topography of the ground, the gulch coming down, in the way described by the witnesses, you, as men of some knowledge of affairs, may determine in your own minds quite independently of Mr. Hall's testimony whether it was

practicable to make a culvert there with reasonable cost which would have the effect to carry away the sand and gravel so it would not be an obstruction. I believe they testify to some rock
39 coming down in the sand, whether it would carry it away so it would not be an obstruction upon the track."

Thereupon, the jury rendered a verdict in favor of the plaintiff and against the defendant for the sum of three thousand (3,000) dollars, and the defendant then gave notice of motion for a new trial, which said motion is in the words and figures as follows, to wit:

Now comes the said defendant herein, and moves the court to set aside the verdict heretofore rendered herein, and to grant a new trial, for the following reasons:

First. Because the court erred in admitting incompetent, irrelevant and immaterial testimony, offered by the plaintiff against the objection of defendant.

Second. Because the court erred in refusing to admit proper, competent, material and relevant testimony offered by defendant.

Third. Because the court erred in refusing to instruct the jury as requested by defendant.

Fourth. Because the court erred in instructing the jury on its own motion.

Fifth. Because the court erred in refusing to instruct the jury to find for the defendant.

Sixth. Because the verdict is contrary to law and against the evidence.

Seventh. Because the verdict is excessive.

Eighth. Because the verdict is against the weight of the evidence.

TELLER & ORAHOOD,
Attorneys for Defendant.

Indorsed: 2622. Circuit court. O'Brien *vs.* The Union Pacific Railway Company. Offs. Copy. Motion for new trial. Filed 6 | 1 | '91.

And afterwards, and on, to wit: the 7th day of July, 1891, the said motion for new trial was overruled, and judgment was entered on the verdict of the jury for the sum of three thousand ($3,000) dollars; to which ruling of the court in overruling said motion and entering of judgment, defendant, by its counsel, then and there duly excepted.

And, forasmuch, as the foregoing matters and things do not fully appear of record herein, the defendant makes and tenders this its bill of exceptions, and asks that the same may be signed
40 by the court as of the 15th day of September, 1891, which is done accordingly this 15th day of September, 1891.

By the court:

MOSES HALLETT, *Judge.*

Indorsed: 2622. U. S. circuit court. Nora O'Brien *vs.* The Union Pacific Railway Company. Bill of exceptions. Filed Sept. 15, 1891. Robert Bailey, clerk U. S. circuit court. Teller & Orahood, attorneys for the Union Pacific Railway Company.

And afterwards, and on the same day, to wit: the 15th day of September, A. D. 1891, came again the said defendant by its attorneys aforesaid, and filed in said court and in said cause its assignment of errors.

And said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

In the Circuit Court of the United States for the District of Colorado.

NORA O'BRIEN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.
} Assignment of Errors.

Now comes said The Union Pacific Railway Company, defendant herein, and says that in the record and proceedings herein there is manifest error in this, to wit:

First. The court erred in sustaining the objection of plaintiff's counsel to the question asked on cross-examination of witness, William Hall, after the witness had stated that heavy rains were usual in August and September at the place of the accident; and the witness being asked, "Are the engineers all aware of that fact?" and in refusing to allow the witness to answer the question.

Second. The court erred in refusing to allow the witness, Hall, to answer the following question:

"You said you thought the culvert would make it much safer; but is not that cut constructed there, and the water runs out of it exactly as the cuts are ordinarily constructed on the roads running through such places?"

Third. The court erred in overruling defendant's objection to the question asked of Thomas O'Brien, as follows: "Did you ask the question, 'George, are you in a condition to talk?' Did he say 'Yes,' to that?" And also to the question; "Did he say 'No; we did not have time to say anything until the train struck?'"

41 Fourth. The court erred in refusing to give the instructions asked for by the defendant, set forth in the bill of exceptions and numbered 1, 2, 3 and 4.

Fifth. The court erred in instructing the jury as follows, to wit:

"There is, however, another matter which stands in a different attitude, and that is as to the construction of the road at the place where the accident occurred. There is testimony to show that the road at that place was built across the mouth of a gulch or draw, and if I understand the testimony well, about upon the same level as the mouth of the draw, and that the gap which was made by the draw below the track and towards the river on the right-hand side

coming this way, was closed up by the earth taken from the cut or perhaps by the sand which had washed down; and it would seem from all of the circumstances detailed in evidence that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which the sand might have washed out towards the river, and in that manner obstruction might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think from all that is stated before you it is fairly open to this construction. Of course that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track, and upon the quantity of sand and gravel coming down through the gulch; but looking into all the circumstances as well as you can understand them from the testimony, if you are of the opinion that the track might have been built in this way, with reasonable expense, so as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place. It seems from the testimony that this track had been obstructed several times; I do not recall just how often before this time, so that there was enough in the circumstances to call the attention of the company to the fact that there was danger from this source.

It is true that in building its road, and as a matter of duty towards persons in its service, the company is only required to exercise ordinary diligence and care, such care and diligence as men usually bestow upon business of the like nature; that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns.

Then the question will be in your minds whether the road at this place was built with ordinary care and diligence, with a view to the protection of the lives of persons in the service of the company.

42 The rule is different when it comes to the case of a passenger; a passenger who is injured may complain of almost anything as a defect in the road and its structure, showing negligence on the part of the company.

But in respect to persons who are employed by the company the rule is somewhat different, that is to say there is a less degree of care and diligence required of the company in respect to the servants of the company than is required in respect to persons traveling on the road in the capacity of passengers.

So, then, gentlemen, if you are able to relieve the deceased in respect to saying that he was in the fulfillment of his duty, was performing well the duty which was required of him on the occasion, and that the company is negligent in respect to the manner of constructing its road, you may be able to find a verdict for plaintiff: otherwise for the defendant."

Also:

"Mr. WILLARD TELLER: I would like to ask specially—refer-

ring to the question of this culvert—I would like to have the court charge the jury that there is no evidence, except that of Mr. Hall, in respect to whether a culvert would be safer or not, and that is an opinion of his, that he thought it would be safer; that is the only evidence in respect to it.

The COURT: I believe that is true; I think that he is the only witness who testified in that way. I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters, that is to say, having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by witnesses; you, as men of some knowledge of affairs may determine in your own minds, quite independently of Mr. Hall's testimony, whether it was practicable to make a culvert there with reasonable cost, which would have the effect to carry away the sand and gravel so it would not be an obstruction. I believe they testify to some rock coming down in the sand; whether it would carry it away so it would not be an obstruction upon the track."

Sixth. The court erred in denying the motion for a new trial.

TELLER & ORAHOOD,
Attorneys for Defendant.

Indorsed: No. 2622. Circuit court. Nora O'Brien *vs.* The Union Pacific Railway Company. Assignment of errors. Filed Sept. 15, 1891. Robert Bailey, clerk U. S. cir. court. Teller & Orahood, attorneys for the Union Pacific Railway Company.

43 And on to wit: the 5th day of August, A. D. 1891, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its bond, and sued out of said court a writ of error and citation to the United States circuit court of appeals for the eighth circuit.

And the said bond is in words and figures as follows, to wit:

Supersedeas Bond.

Know all men by these presents that we, The Union Pacific Railway Company, a corporation, as principal, and Willard Teller and Samuel N. Wood, of the county of Arapahoe, State of Colorado, as sureties, are held and firmly bound unto Nora O'Brien in the full and just sum of four thousand ($4,000) dollars, to be paid to the said Nora O'Brien, her heirs, executors, administrators or assigns, and — which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 28th day of July, in the year of our Lord, one thousand, eight hundred and ninety-one.

Whereas, lately at the May term of the circuit court of the United States, in and for the district of Colorado, in a suit pending in said court between Nora O'Brien, plaintiff, and The Union Pacific Railway Company, a corporation, defendant, judgment was rendered

against the said The Union Pacific Railway Company in the sum of three thousand (3,000) dollars, and the said The Union Pacific Railway Company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation to the said Nora O'Brien, citing and admonishing her to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of Saint Louis, State of Missouri, sixty (60) days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company, a corporation, shall prosecute said suit and writ of error to effect, and answer all damages and costs if it fails to make good its plea, then this obligation to be void; else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY,
By WILLARD TELLER,
Its Attorney-in-fact.

[SEAL.] WILLARD TELLER.
[SEAL.] SAMUEL N. WOOD.

44 The above bond is hereby approved August 5th, 1891.

I. C. PARKER,
United States District Judge.

Indorsed: 2622. Circuit court United States, district of Colorado. Nora O'Brien *vs.* The Union Pacific Railway Company. Supersedeas bond. Filed August 5th, 1891. Robert Bailey, clerk United States circuit court.

And the said writ of error, with the return of the clerk thereto is next hereto attached, to wit:

Writ of Error.

Writ of error to the United States court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the May term, 1891, thereof, between Nora O'Brien and The Union Pacific Railway Company, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United State circuit court of appeals, for the eighth circuit, on or before the 16th day of November, 1891, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

45 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the 116th year. Issued at office in Denver, in said district, with the seal of the circuit court of the United States, for the district of Colorado, and dated as aforesaid.

Seal of the United States Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado.

Allowed by—

MOSES HALLET, *Judge.*

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this 8th day of October, 1891.

Seal of the United States Circuit Court, District of Colorado.

ROBERT BAILEY, *Clerk.*

DISTRICT OF COLORADO, *ss:*

The plaintiff in error, having served this writ, by lodging a copy thereof in the clerk's office where the record remains, and having given the security required by law on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

Seal of the United States Circuit Court, District of Colorado.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this 22d day of September, A. D. 1891.

ROBERT BAILEY, *Clerk.*

46 Gen. No. 2622. United States circuit court of appeals, eighth circuit. The Union Pacific Railway Company, plaintiff in error, *vs.* Nora O'Brien, defendant in error. Writ of error to the circuit court U. S., district of Colorado. Filed in United States circuit court, district of Colorado, this — day of ——, A. D. 189–. Teller & Orahood, Denver, attorneys for plaintiff in error.

And the said citation and proof of service thereof is next hereto attached, to wit:

Citation.

Citation United States circuit court of appeals.

UNITED STATES OF AMERICA, }
District of Colorado. }

THE UNITED STATES OF AMERICA:

To Nora O'Brien, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of Colorado, sitting at Denver, in said district, wherein The Union Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States, for the district of Colorado, this 22d day of September, in the year of our Lord, one thousand, eight hundred and ninety-one.

MOSES HALLETT,
Judge of Cir. Ct. U. S.

Proof of Service.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Service of a copy of the within citation on me as attorney of the within-named defendant in error, Nora O'Brien, is hereby ad-

mitted and accepted, and service upon said Nora O'Brien, personally waived.

H. E. LUTHE,
Att'y for Nora O'Brien, Def't in Error.

47 Denver, Colorado, Sept. 22d, 1891.

Gen. No. 2622. United States circuit court of appeals, eighth circuit. The Union Pacific Railway Company, plaintiff in error, *vs.* Nora O'Brien, defendant in error. Citation. Filed in United States circuit court for the district of Colorado, this 22d day of September, A. D. 1891. Robert Bailey, clerk. Teller & Orahood, attorneys for plaintiff in error.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States, for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the record and proceedings heretofore in said court, and in a certain cause lately in said court pending, wherein Nora O'Brien was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remains on file or of record in my office.

Seal of the United States Circuit Court, District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 8th day of October, A. D. 1891.

ROBERT BAILEY, *Clerk.*

48 And on the 11th day of November, 1891, an appearance of counsel for plaintiff in error was filed in the office of the clerk of said circuit court of appeals in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORA O'BRIEN, Appellee,
vs.
UNION PACIFIC R'Y CO., Appellant. } No. 43.

The clerk will enter my appearance as counsel for the plaintiff in error.

(Signed) JOHN M. THURSTON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 43. Union Pacific Railway Company, pl'ff in error, *vs.* Nora O'Brien, def't in error. Appearance. Filed Nov. 11, 1891. John D. Jordan, clerk. John M. Thurston, counsel for plaintiff in error.

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
NORA O'BRIEN, Defendant in Error. } No. 43.

The clerk will enter our appearances as counsel for the plaintiff in error.

(Signed) WILLARD TELLER.
H. M. ORAHOOD.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 43. Union Pacific Railway Company, pl'ff in error, *vs.* Nora O'Brien, def't in error. Appearance counsel for pl'ff in error. Filed Nov. 11, 1891. John D. Jordan, clerk.

49 And on the 19th day of November, 1891, an appearance of counsel for defendant in error was filed in the office of the clerk of said circuit court of appeals in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
NORA O'BRIEN, Defendant in Error. } No. 43.

The clerk will enter my appearance as counsel for the defendant in error.

(Signed) H. E. LUTHE,
Att'y for Defendant in Error.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 43. The Union Pacific Railway Company, pl'ff in error, *vs.* Nora O'Brien, def't in error. Appearance. Filed Nov. 19, 1891. John D. Jordan, clerk. H. E. Luthe, counsel for defendant in error.

50 And on the 3rd day of February, 1892, in the record of the proceedings of the said circuit court of appeals is an entry of the submission of said cause in the words following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

WEDNESDAY, *February* 3, 1891.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
NORA O'BRIEN, Defendant in Error. } No. 43.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard and argument was commenced by Mr. Willard Teller in behalf of plaintiff in error, and continued by Mr. H. E. Luthe in behalf of the defendant in error, and concluded by Mr. John M. Thurston for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of the record and briefs of counsel filed herein.

And on the 8th day of February, 1891, an opinion of the said circuit court of appeals was filed in said cause in the words following, to wit:

51 United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891,

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
NORA O'BRIEN, Defendant in Error. } No. 43. In Error to the Circuit Court of the United States for the District of Colorado.

John M. Thurston, Willard Teller, H. M. Orahood, Edward B. Morgan, counsel for plaintiff in error.

H. E. Luthe, counsel for defendant in error.

Before Caldwell, Shiras, and Thayer, JJ.

SHIRAS, *J.:*

In September, 1890, John O'Brien, the husband of the defendant in error, was in the employ of the Union Pacific Railway Company as a locomotive engineer, running an engine upon the South Park division of the company's line. By a derailment of his engine on the 4th day of September, 1890, the said John O'Brien was killed, and the present action was brought by his wife to recover damages therefor.

The evidence shows that the accident occurred about one o'clock in the morning of the day named, at a place known as Platte Canyon, the deceased being in charge of an engine which was propelling a train of freight cars, some twenty-three in number; that the line of railway is built along the South Platte river, and of necessity there are numerous cuts thereon, caused by the intersection of the line with the spurs projecting from the high lands along which

the line is built; that the engine was derailed by reason of sand and gravel which had been washed upon the track to the depth of some six inches and to a width of about fifteen feet; that this
52 deposit of sand and gravel was in a cut, the river bank of which was six or eight feet high, the other bank being much higher and sloping up the side of the hill or mountain; that on the hill-side of the cut there was a gully running back for some distance, which in times of rain would bring down sand and other material; that there was no opening or culvert under the railway track through which the water and the material brought down by it could escape; that there was alongside the road-bed a small gutter, but, if the water coming down was greater in quantity than this ditch or gutter would carry away, then the surplus would run over and upon the track and rails of the railway; that during the evening preceding the accident rain had fallen and the water, rushing down the gully named, had carried the sand and gravel upon the track to the extent already stated.

The case was sent to the jury upon the issues of negligence on part of the company, in not properly constructing the track, in that no outlet was provided for the water which would be liable to come down upon the track and deposit thereon sand and other obstructions, and of contributory negligence on part of the deceased; and upon both issues the jury found in favor of the plaintiff, assessing the damages at $3,000, and judgment being entered upon the verdict, the company brings the case to this court.

The first error assigned is based upon the action of the court in sustaining an objection to a question asked by the plaintiff in error in cross-examination of a witness—William Hall—who testified that he was a locomotive engineer and was well acquainted with the line of railway upon which the accident happened; that there are many cuts upon the line; that in August and September rains were usually frequent, and that in rainy weather, on account of the steepness of the mountains, more or less sand would be deposited on the track.

Thereupon, counsel for the company asked the question, "Are the engineers all aware of that fact?" which was objected to and the objection was sustained.

It is perfectly clear from the context that the purpose of this question was to get the witness to testify to a matter purely of inference from the facts he had previously stated; that is, he had testified that, owing to the surroundings of the railway line in rainy weather, more or less sand would be deposited at various points along the line, and the question objected to was asked with the view of having the witness draw the inference that the frequency of the deposits would necessarily bring knowledge of the fact to all the engineers running on the line.

The facts having been fully put in evidence, it was for the jury to determine whether the facts proven would justify inference of knowledge on part of all the engineers; and it was not error, therefore, to sustain the objection to the question proposed.

The second error relied on arises on the refusal of the court to

permit the same witness, after testifying to facts tending to show the need of a culvert at the cut where the accident happened, and that in his judgment a culvert would add to the safety of the road, to answer the question:

"You said you thought the culvert would make it much safer, but is not that cut constructed there and the water run out of it exactly as others are ordinarily constructed on roads running through such places?"

53 It is argued on behalf of plaintiff in error that if the company could show that this cut was constructed as cuts in similar places on roads running through a region of like character, it would be evidence tending to show that it had used ordinary care in the construction of this cut.

If a bridge upon a line of railway breaks down, the company may show that the bridge is of an approved make or pattern, and is in common use upon other lines of railway, as evidence tending to show that the company was not in fault in using that make of bridge.

If the issue is whether the company uses proper precautions to prevent the escape of sparks from its locomotives, it may show that the same are equipped with the appliances in common use upon other roads.

If the charge of negligence is that the company did not use ties of sufficient size or of proper material, or used rails that were not of sufficient weight, then it might be competent to show that upon other roads, carrying on the same kind of traffic, similar ties or rails were in common use and were found to meet the demands put upon them.

In all such cases the inquiry is whether the use of a particular article is justified by the usage of other companies; and there is no danger of the jury being misled as to the exact nature or mode of construction of the article inquired about.

It cannot be claimed that cuts upon railways are made according to a certain recognized pattern. The necessity of a culvert or water outlet in a cut depends upon the surroundings, in which no two are exactly alike. We know from our common knowledge that in many cuts there are to be found culverts and in others there are none. It would have been of no aid to the jury to have proved that in many cuts no culverts were used, without further showing that the surroundings thereof were substantially similar to that where the accident happened, and this would have required an examination into a number of collateral facts that would have led away the jury from the issues on trial before them.

It is said that the question as put to the witness met this difficulty, in that it asked whether the cut was not the same as the "cuts ordinarily constructed on roads running through such places."

This would necessitate one of two results. The witness must, in his own mind, determine whether the places referred to were in fact similar to the one where the accident happened, and the jury must be satisfied to take the opinion of the witness on the fact of the

similarity of the respective cuts and their surroundings, or else the witness must describe in detail all the cuts he knew of "running through such places," which could only result in utterly befogging the jury, because if that line of inquiry should be opened to the one party, the other must be permitted to show the nature of the cuts in which culverts are found, and also to introduce evidence showing the actual nature and surroundings of the cuts which might be described by the witness.

Under all the circumstances, and in view of the fact that the contention of the plaintiff was that the making of an outlet for the water was demanded in this particular cut, by reason of the track crossing a gulch or natural waterway, and not simply because it passed through a cut, which fact is not included in the ques-
54 tion asked, and for the reason that if that line of inquiry was entered upon, there was danger of distracting the jury by leading them off upon collateral matters, we cannot hold that it was error to exclude the question.

The third assignment of errors is that the court erred in permitting leading questions to be put to the witness O'Brien.

The defendant had called as a witness, George Warnick, who testified to matters tending to show that the deceased had not kept a vigilant watch for obstructions on the track, and on cross-examination he was asked whether, shortly after the accident, he did not, in reply to questions put to him by the witness O'Brien, state that neither he nor the engineer were to blame for the accident. For the purpose of impeaching the witness Warnick, O'Brien was called in rebuttal and he was asked directly whether he had put certain questions, which were detailed to him, to Warnick and whether the latter had not answered them yes and no.

When impeaching testimony of this character is sought to be introduced, it is within the discretion of the trial court to permit a catagorical or leading question to be put to the witness, where that mode of interrogation is best calculated to elicit the truth.

1st Greenleaf on Evidence, section 435.

It is further assigned as error that the court refused to give the instructions asked by defendant, which were four in number and read as follows:

"The court is asked to instruct the jury that the burden of proof is upon the plaintiff to show that the accident occurred by reason of the negligence of the defendant, and that the plaintiff was in the exercise of due care at the time of the accident, and that due care in such a case required of the deceased that he be vigilant and watchful to avoid such danger as his experience of the road must have made him aware he must expect in such places as the place where the accident occurred, and under the circumstances detailed by the witnesses, to wit, at times when heavy rains had been met with, and that there has been offered no evidence whatever upon that point by the plaintiff, not even a reputation for care, but there has been evidence offered by the defendant that he was not in the exercise of due care; nor has there been any evidence offered as to

whether, if the sand had been discovered at the time it might have been discovered, he could or could not have applied the air in time to prevent the accident."

"The court is asked to instruct the jury that a party taking employment as an engineer in running a locomotive assumes the risks that are incident to the employment, and to the running of locomotives over the roads operated by his employer, and if the jury believe that the country through which this road ran, and its location was such that sand was frequently deposited on the track, then the deposit of sand on the track when heavy rains occurred must be taken as one of the ordinary risks of his employment, and the duty of the engineer was to be vigilant in avoiding it; and if the jury believe that the lack of such vigilance on the part of the deceased contributed to the accident, then the plaintiff cannot recover."

"The court is asked to instruct the jury that the duty that an employer owes to the employé is to exercise ordinary care in
55 providing the employé a safe place in which to work; and what is ordinary care is such care as men of ordinary prudence use in similar circumstances in the same employment."

"The court is asked to instruct the jury that there is no evidence to show that the construction of a culvert at the place where the accident happened would have avoided, or would probably have avoided, the accident."

The first instruction is faulty in that it declares that the burden was on the plaintiff in the first instance to show that the plaintiff was in the exercise of due care at the time of the accident. It is said that the use of the word "plaintiff" was evidently a clerical error, and that it would be readily perceived that it was intended to charge that it must be shown that the deceased was free from negligence, but if the charge had been given as asked, it might have misled the jury. As framed, it does not state the law correctly, and therefore it cannot be successfully maintained that it was error to refuse it, especially in view of the fact that the court did instruct the jury carefully and fully upon the question of negligence on part of the deceased.

It is claimed on behalf of plaintiff in error that the second instruction asked by the company, presents the rule that an employé assumes the ordinary risks of his employment and cannot recover for an injury resulting therefrom, and that the court did not present this question to the jury.

It is doubtful whether the instruction was intended to refer to this rule, for the concluding part thereof only asks the court to rule to the jury, that if lack of vigilance on the part of the deceased contributed to the accident, then the plaintiff could not recover, and it is entirely probable that the trial court understood the instruction to be applicable only to the question of contributory negligence, which was fully covered by the charge of the court.

If the present contention of counsel is correct, then the instruction as asked is open to the objection that it confuses together two distinct propositions, to wit:

That relating to the risks assumed by an employé in entering a

given service, and that relating to the amount of vigilance that should be exercised under given circumstances, a mode of asking instructions which cannot be approved, as it is liable to mislead the court and to confuse the jury.

Granting, however, to the plaintiff in error the benefit of the exception now urged, it does not appear that it was error to refuse the instruction under the circumstances of this case.

It is doubtless true, as urged in argument, that persons employed upon lines of railway which are constructed at the foot of mountain ranges are necessarily subjected to greater dangers than those employed upon railways passing through a prairie country, for the reason that there is greater liability to obstructions being thrown upon the track in the one case than in the other, and it is unquestionably true that one who engages as an engineer or other train hand upon a line running at the foot of a mountain range assumes the increased risk due to this fact. In neither case, however, does the employé assume the risks and dangers that are caused by negligence on part of the railway company.

56 It is the duty of the company to use all such reasonable care, as a corporation managed by prudent men should use, in constructing and maintaining a track and road-bed in such a condition as not to subject its employés to unnecessary risks and dangers. What will be required of a company in the exercise of ordinary care in constructing its track will vary with circumstances. A mode of construction which might be entirely safe in case of a line running through a level country, might be wholly unsafe if applied to a line running along a mountain range. The employé has a right to expect that a company operating a line, which by reason of its location is subject to certain hazards, will construct the road-bed and track with due reference to such hazards.

If the company has used due care in the construction of its line, having regard to its surroundings and yet by reason of its proximity to mountains, rivers or other natural objects, there exist dangers from landslides or overflows or other like casualties, a person entering into service of the company, assumes the risks caused thereby, or, to state the proposition in another form, he assumes the dangers incident to his employment upon a railway track, properly and carefully constructed and maintained along a mountain range; but he does not assume the risks caused by the faulty construction and maintenance of a road-bed and track, even though the liability to accidents, by reason of the imperfect road-bed and track, may be increased because the same is built in proximity to a mountain range.

In the case at bar, the deceased, when he entered the employ of the company, had the right to assume that the road-bed and track which he was expected to use, had been constructed properly and with ordinary care, having due regard to the location of the track and its surroundings, and if such a road-bed and track so constructed and maintained were in fact furnished him, then he assumed the risks and dangers due to the fact that the line ran along the

foot-hills and would, of necessity, be subject to the possibility of obstructions being cast upon the track from the adjacent mountains.

The plaintiff's case, however, is not based upon the fact that the proximity of the railway line to the highlands caused danger to the employés, but upon the allegation that the company in constructing its road-bed over what nature had marked out as a waterway, to wit, the gulch upon the hillside, did not use due care and was negligent in that no outlet was provided for the water, which the company was bound to know would in the rainy seasons come down the gulch, bearing with it sand, gravel and other like material.

The question is not other nor different from that which arises in all cases where a railway is constructed over a natural waterway, whether in a prairie or mountainous country. The duty is upon the company to use due care to so construct its road-bed at the place where it crosses the waterway that it may be reasonably safe for use, and if to that end a culvert or other means of escape for the water is necessary, and none is provided, but on the contrary the road-bed is built solidly across the waterway, thus subjecting the track to the liability of being covered with sand and gravel, then a jury would be justified in finding that the road-bed was improperly built, thereby sustaining the charge of negligence against the company.

57 If the evidence in this case had shown that, owing to heavy rains or for any reason, sand, rock or other obstructions had been washed down the mountain side and upon the track at a place where the company had no special reason to anticipate such an event, then there would be force in the position that the deceased assumed risks of that character; but the facts developed in the evidence did not present the case in that light. The evidence clearly shows that the sand and gravel on the track were washed down the gulch or natural waterway, and the theory of plaintiff's case is that the company was negligent in building a solid road-bed across a natural waterway, and in failing to provide any means for the escape of the water that must be expected to flow down the gulch. Upon this issue the case was sent to the jury, and the giving of the second instruction, asked by defendant, would not have aided them in reaching a conclusion thereon. Hence, in any view that may be taken of the extent and purpose of this instruction, it was not error to refuse it.

The third instruction was fully covered in the charge given, and the court was not called upon to repeat the same general rule of law in the form adopted by counsel.

The fourth instruction was properly refused, because there was evidence before the jury tending to show that if a culvert or other outlet for the water, coming down the gulch at the place of the accident, had been provided the track would not have become covered with sand and gravel.

In order that it may clearly appear that, as already said, it was not error to refuse the several instructions asked by the defendant, because the same, in so far as they are correct statements of the law,

are embraced in the charge of the court, it may be advisable to quote at length therefrom.

It was stated to the jury by the court that "the rules to be applied in determining this controversy, gentlemen, are applicable to all cases in which a person in service may have a right of action against his employer. The circumstance that the defendant is a railroad company does not distinguish the case from others of the same class. In general, a person who receives an injury while in the service of another has no right of action against his employer for such injury. It is only when the person employing him has omitted some duty—failed in something enjoined upon him by the law—that any such right arises. And this right arises only when the person injured is in the discharge of his duty to the extent that it may be said that he is free from fault. (The person injured must be without fault, and the employer must be in fault, before any right of action can exist.) So in all these cases there is a double aspect. It is first to be ascertained whether the person injured was in any way negligent; and secondly, whether the employer was negligent in a manner which caused the injury. These features must co-exist; the person employed must be without fault, the other must be in fault. If the employer had been in fault, and the other has been negligent also, there is no right of action.

II. And in this instance, upon the circumstance developed by the evidence, it is especially necessary to consider first, and decide whether this man who lost his life was in fault at the time
58 of the accident (there is some evidence tending to show that storms in the region of country traversed by this railroad are of frequent occurrence in the fall season of the year, and with the effect often to bring down upon the track considerable quantities of sand and gravel); so that, with a storm prevailing at and before the time of the accident, the circumstances were such as to make it reasonable to expect that some such thing would occur as did in fact occur, in respect to washing down gravel and sand upon the track; and this made it the duty of the engineer to look out for these things very carefully. It was necessary for him, under all the circumstances, to be especially upon his guard in order to avoid injury to his train and to himself. And there is evidence tending to show that he was not in that attitude at the time of the accident. You remember that the fireman who was with him upon the engine states that at the time of the accident he was of the impression that the engineer was asleep. He cannot state this with certainty, only from the position in which he sat, and from his attitude at the time. Now, if that be true, there can be no right of action in the plaintiff here for his death, because all the circumstances required him to be vigilant and attentive to his duties in the place in which he was put. If he had been awake, and looking out for obstructions upon the track, it might be that he would have seen this obstruction in time to stop, or at any rate to check the train so that the engine would not have been overturned, and thus the injury would not have resulted."

The court then instructed the jury that the plaintiff could not

recover on the ground that the sectionmen had not properly watched the track for obstructions, which was one of the matters complained of, for the reason that such negligence, if it existed, would be due to the act of a fellow-servant, for which the company would not be liable, and then gave the following instructions, the giving of which is assigned as error:

"V. There is, however, another matter which stands in a different attitude, and that is as to the construction of the road at the place where the accident occurred. There is testimony to show that the road at that place was built across the mouth of the gulch or draw, and, if I understand the testimony well, about upon the same level as the mouth of the draw, and that the gap which was made by the draw below the track and towards the river on the right-hand side coming this way, was closed up by the earth taken from the cut or perhaps by the sand which had washed down; and it would seem from all the circumstances detailed in evidence that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which the sand might have washed out towards the river, and in that manner obstruction might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think from all that is stated before you, it is fairly open to this construction. Of course, that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track, and upon the quantity of sand and gravel coming down through the gulch; but, looking into all the circumstances as well as you can understand them from the testimony, if
59 you are of the opinion that the track might have been built in this way with reasonable expense, and so as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place. It seems from the testimony that this track had been obstructed several times; I do not recall just now how often this time, so that there was enough in the circumstances to call the attention of the company to the fact that there was danger from this source."

"VI. It is true, that in building its road, and as a matter of duty towards persons in its service, the company is only required to exercise ordinary diligence and care; such care and diligence as men usually bestow upon business of the like nature; so that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns."

Then the question will be in your minds, whether the road at this place was built with ordinary care and diligence, with a view to the protection of the lives of persons in the service of the company.

The rule is different when it comes to the case of a passenger; a passenger who is injured may complain of almost anything as a defect in the road and its structure, showing negligence on the part of the company.

But in respect to persons who are employed by the company, the rule is somewhat different; that is to say, there is a less degree of care and diligence required of the company in respect to the servants of the company than is required in respect to persons traveling on the road in the capacity of passengers.

So, then, gentlemen, if you are able to relieve the deceased, in respect to saying that he was in the fulfillment of his duty, was performing well the duty which was required of him on the occasion, and that the company is negligent in respect to the manner of constructing its road, you may be able to find a verdict for plaintiff; otherwise for the defendant."

"VII. Mr. WILLARD TELLER: I would like to ask specially referring to the question of this culvert; I would like to have the court charge the jury that there is no evidence except that of Mr. Hall in respect to whether a culvert would be safer or not, and that is an opinion of his, that he thought it would be safer, that is the only evidence in respect to it.

The COURT: I believe that is true; I think that he is the only witness who testified in that way; I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters; that is to say, having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by the witnesses, you as men of some knowledge of affairs, may determine in your own minds, quite independently of Mr. Hall's testimony, whether it was practicable to make a culvert there with reasonable cost, which would have the effect to carry away the sand and gravel so it would not be an obstruction; I believe they testify to some rock coming down in the sand; whether it would carry it away so it would not be an obstruction upon the track."

Exception is taken to the portions of the charge wherein it is said that the jury might exercise their own judgment and knowl-
60 edge upon the evidence adduced before them in regard to the situation of the road, the topography of the ground and the existence of the gulch, and determine therefrom whether or not it was practicable to make a culvert at a reasonable cost, which would carry away the sand and gravel and prevent the same from becoming an obstruction on the track.

It does not appear that objection was taken to this evidence when it was introduced, and if the jury could not properly consider and weigh the same in reaching a conclusion upon the issue before them, it was a useless waste of time to put it before them.

Clearly, when the jury was called upon to determine whether a given part of the road was or was not properly built, it was necessary that they should be informed by evidence of the mode in which the track was constructed, of the nature of the ground and its surroundings, in order to aid them in reaching a proper conclusion.

If admissible upon the issue, then it would be impossible to prevent a jury from using their own judgment and knowledge in determining what conclusion should be drawn from the evidence.

The human mind is so constituted that in considering and weighing different facts and endeavoring to apply the same to the solution of a matter in dispute, the conclusion reached will be the result of the facts in evidence viewed in the light cast thereon by the judgment and knowledge belonging to the deciding mind.

There was nothing in the nature of the inquiry involved in the issue submitted to the jury, which took it out of the usual rule that the jury must decide the ultimate question in dispute.

Counsel for plaintiff in error cite in argument the decision of the Supreme Court in the case of Tuttle *vs.* Detroit, etc., R'y Co., 122 U. S., 189, wherein it was sought to hold the company liable in damages for the death of a switchman, who was crushed between two cars, the drawheads of which passed or slipped by each other, which in turn was caused by the extreme sharpness of the curve in the line of the railway at the point where the accident happened.

The ground of negligence charged was that the curve was so sharp as to render the road unsafe. It was held that there was no rule of law restricting a railway company, so far as its duty to employés was involved, in the character of the curves it might put in use, and that engineering questions of this character could not be left to the varying and uncertain opinions of juries.

It may well be, when it becomes necessary to build a line of railway through a rough and broken country, or to construct side tracks in the narrow limits of a railway yard, that it must be left to the engineer in charge thereof, assuming that he is of competent skill and acquirements, to define the curves that are called for by the exigencies of the situation; and, the road being built in accordance with his directions, that any one entering into the employ of the company must be held to have assumed the risks due to the sharpness of the curves, the existence of which is, of course, open to his knowledge.

This principle, however, cannot be carried to the extent claimed in argument by counsel for plaintiff in error.

If it was applicable in the broad sense claimed for it, the result would be that the well-established rule, that it is the duty of
61 the company to use due care and skill in the construction and maintenance of the road-bed and track and in the furnishing of proper machinery for the use of its employés, would be wholly abrogated.

In one sense it is a question of engineering skill to determine how a road-bed and track shall be constructed, and if the conclusion of the engineer in charge thereof is final, and cannot be challenged before a court and jury by one who has suffered injury by reason of defects in the road-bed and track, then it is useless to say that a railway company is bound to exercise due care in the construction of its road-bed, for it could always be prepared to prove that the road was built in accordance with the directions of its engineer.

The difference between the kind of knowledge called into action in determining the sharpness of a curve that is needed in running a railway line at a given point, and that exercised in determining

whether the exigencies of a given situation require that some escape or outlet should be furnished for water, liable to come down a natural waterway, intersecting the line of railway, is so great that it renders the rule, applicable to the one case, inapplicable to the other.

The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully or similar waterway, nor to know if an obstruction like a solid railway road-bed is built across a waterway, down which any considerable amount of water may be expected to pass, that unless an outlet is given to it it must of necessity collect against the road-bed and perchance overflow it. Such facts are matters of common knowledge, gathered from the experience and observation of every-day life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature.

In the instructions given the jury, the court very carefully pre sented the decisive questions involved in the issues and correctly stated the law applicable thereto.

The errors assigned are therefore overruled, and the judgment is affirmed at cost of plaintiff in error.

Filed February 8, 1892.

62 And on the 8th day of February, 1892, in the record of the proceedings in the said circuit court of appeals is a judgment in said cause in the words following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

MONDAY, *February* 8, 1891.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
NORA O'BRIEN, Defendant in Error. } No. 43.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the said Nora O'Brien recover against the said Union Pacific Railway Company twenty dollars for her costs herein expended and have execution therefor.

February 8, 1892.

63 And on the 10th day of March, 1892, a mandate directed to the circuit court of the United States for the district of Colorado was issued in said cause; which mandate is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Whereas lately, in the circuit court of the United States for the district of Colorado, before you or some of you, in a cause between Nora O'Brien, plaintiff, and The Union Pacific Railway Company, defendant, wherein the judgment of the said circuit court, entered in said cause on the 7th day of July, A. D. 1891, is in the following words, viz:

"On the 7th day of July, A. D. 1891, the same being one of the regular judicial days of the May term, A. D. 1891, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendant three thousand dollars ($3,000), her damages by occasion of the premises in her complaint mentioned, in form aforesaid assessed, and her costs by her laid out and expended, to be taxed, and have execution therefor;"

As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, eighth circuit, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the
64 said Nora O'Brien recover against the said Union Pacific Railway Company twenty dollars for her costs herein expended, and have execution therefor.

February 8, 1892.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the tenth day of March, in the year of our Lord one thousand eight hundred and ninety-two.

(Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Def't in Error.

Clerk	
Printing record.....	
Attorney.....	$20 00
	$20 00

Paid by pl'ff in error.

(Endorsed:) United States circuit court of appeals. No. 43. October term, 1891. Union Pacific Railway Company *vs.* Nora O'Brien. Mandate.

65 And on the 4th day of April, 1892, a supersedeas bond on writ of error was filed in said cause in the words and figures following, to wit:

Know all men by these presents that we, The Union Pacific Railway Company, as principal, and Sidney Dillon and George J. Gould, of the city of New York, as sureties, are held and firmly bound unto Nora O'Brien in the full and just sum of five thousand dollars, to be paid to the said Nora O'Brien, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October term, 1891, of the United States circuit court of appeals for the eighth circuit, in a suit depending in said court between The Union Pacific Railway Company, plaintiff in error, and Nora O'Brien, defendant in error, a judgment was rendered against the plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Nora O'Brien, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE UNION PACIFIC RAILWAY COMPANY,
By SIDNEY DILLON, *President.*

[Seal U. P. R'y Co.]

Attest: EDWIN CANFIELD,
Assistant Secretary.

SIDNEY DILLON. [SEAL.]
GEORGE J. GOULD. [SEAL.]

Sealed and delivered in presence of—
H. L. WILLIAMSON.
GEO. H. BASTEDO.
J. E. VAN HORNE.

66 Approved by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the U. S.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

Sidney Dillon, being duly sworn, deposes and says that he is the owner of real and personal property in the State of New York over and above any exemption and indebtedness to the amount of ten thousand dollars.

(Signed) SIDNEY DILLON.

Subscribed and sworn to before me this 29th day of March, 1892.

[SEAL.] (Signed) EDWARD CANFIELD,
Notary Public.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

George J. Gould, being duly sworn, deposes and says that he is the owner of real and personal property in the State of New York over and above any exemptions and indebtedness to the amount of ten thousand dollars.

(Signed) GEO. J. GOULD.

Subscribed and sworn to before me this 29th day of March, 1892.

[SEAL.] (Signed) EDWARD CANFIELD,
Notary Public.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 43. Union Pacific Railway Company, plaintiff in error, *vs.* Nora O'Brien. Supersedeas bond on writ of error to Supreme Court U. S. Filed Apr. 4, 1892. John D. Jordan, clerk.

67 And on the 4th day of April, 1892, a writ of error was filed in the office of the clerk of said circuit court of appeals in said cause, the original of which writ of error, with the return of the clerk endorsed thereon, is hereto attached and herewith returned in the following words, to wit:

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The Union Pacific Railway Company, plaintiff in error, and Nora O'Brien, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 31st day of March, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Return to Writ of Error.

UNITED STATES OF AMERICA, *Eighth Circuit,* } ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office, in the city of St. Louis, Missouri, this sixteenth day of April, A. D. 1892.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] Orig'l.

69 And on the 16th day of April, 1892, the original citation was filed in the office of the clerk of said circuit court of appeals in said cause, the original of which, with the proof of service endorsed thereon, is hereto attached and herewith returned in the following words, to wit:

70 UNITED STATES OF AMERICA, *ss:*

To Nora O'Brien, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] (Original.) Filed Apr. 16, 1892. John D. Jordan, clerk.

On this 13th day of April, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared C. M. Sperry before me, the subscriber, Charles M. Kendall, a notary public in and for the county of Arapahoe, State of Colorado, and makes oath that he delivered a true copy of the within citation and also true copies of the writ of error and supersedeas bond by handing the same to Herman E. Luthe, Esq., attorney of record for defendant in error, at Denver, Arapahoe county, Colorado, on the 12th day of April, A. D. 1892.

C. M. SPERRY.

Sworn to and subscribed the 13th day of April, A. D. 1892.

{ Seal of Charles M. Kendall, Notary Public, Arapahoe County, Colorado. }

CHARLES M. KENDALL,
Notary Public.

Commission expires August 16, 1892.

Received one copy of the within citation, also one copy of writ of error and one copy of bond in the above-entitled —, at Denver, Colorado, this — day of April, A. D. 1892.

——— ———,
Attorney for Defendant in Error.

71 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing seventy pages, numbered from 1 to 70, inclusive, contains true copies

of all the pleadings, proceedings, and record entries, including the opinion of said court, in the case of The Union Pacific Railway Company, plaintiff in error, *vs.* Nora O'Brien, defendant in error, No. 43, October term, 1891, as the same remains upon the files and records of the said United States circuit court of appeals.

I further certify that the originals of the writ of error and citation, with proof of service thereof, are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals, at the city of St. Louis, Missouri, this sixteenth day of April, 1892.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,040. United States circuit court of appeals, eighth circuit. Term No., 119. The Union Pacific Railway Company, plaintiff in error, *vs.* Nora O'Brien. Filed May 13, 1892.

FILED.
DEC 5 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 119.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

NORA O'BRIEN, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
JOHN M. THURSTON,
Attorneys For Plaintiff in Error.

McGILL & WALLACE, LAW PRINTERS, WASHINGTON, D. C.

A

IN THE

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

NORA O'BRIEN, Defendant in Error.

No. 119.

Brief for Plaintiff in Error.

I.

This was an action brought by Nora O'Brien against The Union Pacific Railway Company to recover $5,000 damages for the death of her husband, John O'Brien, who was a locomotive engineer in the employ of the defendant company. The accident which resulted in the death of plaintiff's husband occurred at 1 o'clock a. m., September 4, 1890. The action was brought January 15, 1891, and trial was had May 25 and 26, 1891. Deceased, at the time of his death, was bringing a freight train of twenty-three cars from Como, Colo., to Denver, and was running through that part of the mountains known as "Platte Canon," where the narrow-gauge railroad, known as the "South Park" road, follows the windings of the South Platte River.

The evidence tended to show that O'Brien left Como at 7 or 8 o'clock the evening of September 3d; that frequent

showers had occurred while coming down the canon; that this season of the year was the rainy season in that region, and that frequent rains might be looked for; that at the place where the accident occurred there had been two rains—one a light one, early in the evening, the other a heavy one, a few hours before the accident; that at the time the accident occurred it was not raining; that the train was running about ten or eleven miles an hour, which was about the schedule time, and that the overturning of the engine, which ran upon sand that had been washed upon the track, was the cause of deceased's death.

The evidence tended to show that at the point where the engine was overturned the roadbed was built through a spur of a foot-hill which came down from the mountains; that the cut was on a curve and approached by a reverse curve; that the bank on the river or right hand, being the lower or east side, was about six or eight feet high, and that on the other side the bank was much higher and very steep, and sloped back up the mountain side. That down this last bank ran a small gully which was ordinarily dry, but which in rainy weather brought down water which carried sand and disintegrated rock. That this water would run both ways beside the track, but that there was no escape or outlet for it in the shape of a culvert under the track. Sand and gravel brought down in this gully and deposited on one side of the track for a length of about fifteen feet and a depth of about six inches was the cause of the overturning of the engine.

Plaintiff in her complaint alleged that at one time there had been a culvert under the track through which water and sand, flowing down from this gully, could escape, but no proof of that fact was attempted or established at the trial.

The facts alleged in the complaint were substantially as given above, and the negligence alleged, on which the

cause of action is based, was (1) that the company failed to have the track properly guarded by track walkers, and (2) that it allowed the track to remain without a drain or outlet for water and sand that might be, and occasionally was, brought down by rains. The allegation that the track was not properly guarded was disposed of by the court's instruction (fol. 48) that, although there was some evidence that the section boss had been spoken to about walking the track, and although it might be a fair inference that it was the practice of the company to have men out looking for obstructions, yet the negligence of the section boss in that respect would be the negligence of a fellow-servant of deceased, and the company could not be charged with negligence in respect to that matter.

The answer of the defendant to the complaint of the plaintiff was an admission of the corporate capacity of the company and a denial of each and every other allegation in the complaint.

It was shown that deceased had been running as an engineer on this road for seven or eight years. That it was a common thing for sand to be washed on the track in these mountainous regions, and that on two other occasions, at least, during the time since this road was built, in 1879, there had been sand in this particular spot that had been shoveled off; that engines frequently went through sand deeper than this sand was, without meeting with mishaps, and that rain might fall on the mountains above and carry down water and sand when no rainfall would occur down in the canon where the track was.

The only testimony given with respect to the question of whether or not a culvert under the track would have added to the safety of this point was that given by the witness Hall, an engineer, and his testimony was merely an opinion.

George Warnick, locomotive fireman, who was with O'Brien when he met his death, and who himself was so severely injured that he was in the hospital three months, testified on behalf of the defendant that he was in his seat when he saw the sand on the track, some thirty or forty feet ahead; that the headlight was burning brightly; that when he looked over to see what O'Brien was doing, he was sitting in his seat with his head down, and it was his (witness's) impression that O'Brien was asleep; that although he (witness) had time to get back on the tender, O'Brien made no effort to get away or to apply the air or reverse the engine. Denied that he had had a conversation with Thomas O'Brien in the Union Pacific hospital, in which he said neither he nor deceased had anything to censure themselves for in respect to the accident.

The jury found a verdict for the plaintiff for $3,000. A motion to grant a new trial was overruled, and defendant comes to this court by writ of error.

II.

The errors relied upon to reverse the judgment in this case are—

1st. The court erred in sustaining the objection of plaintiff's counsel to the question asked on cross-examination of witness, William Hall, after witness had stated that heavy rains were usual in August and September at the place of the accident; and the witness being asked, "Are the engineers all aware of that fact?" and in refusing to allow the witness to answer the question.

2d. The court erred in refusing to allow the witness, Hall, to answer the following question:

"You said you thought the culvert would make it much safer; but is not that cut constructed there, and the

water runs out of it exactly as the cuts are ordinarily constructed on the roads running through such places?"

3d. The court erred in overruling defendant's objection to the question asked of Thomas O'Brien, as follows: "Did you ask the question, 'George, are you in a condition to talk?' Did he say 'Yes,' to that?" And also to the question, "Did he say 'No, we did not have time to say anything until the train struck?'"

4th. The court erred in refusing to give the instructions asked for by the defendant, set forth in the bill of exceptions and numbered 1, 2, 3 and 4, which said instructions were as follows:

No. 1.

The court is asked to instruct the jury that the burden of proof is upon the plaintiff to show that the accident occurred by reason of the negligence of the defendant, and that the plaintiff was in the exercise of due care at the time of the accident, and that due care in such a case required of the deceased that he be vigilant and watchful to avoid such danger as his experience of the road must have made him aware he must expect in such places as the place where the accident occurred, and under the circumstances detailed by the witnesses, to wit, at time when heavy rains had been met with, and that there has been offered no evidence whatever upon that point by the plaintiff, not even a reputation for care, but there has been evidence offered by the defendant that he was not in the exercise of due care; nor has there been any evidence offered as to whether, if the sand had been discovered at the time it might have been discovered, he could or could not have applied the air in time to prevent the accident.

(Asked by defendant.)

No. 2.

The court is asked to instruct the jury that a party taking employment as an engineer in running a locomotive assumes the risks that are incident to the employment, and to the running of locomotives over the roads operated by his employer, and if the jury believe that the country through which this road ran, and its location was such that sand was frequently deposited on the track, then the deposit of sand on the track when heavy rains occurred must be taken as one of the ordinary risks of his employment, and the duty of the engineer was to be vigilant in avoiding it; and if the jury believe that the lack of such vigilance on the part of the deceased contributed to the accident, then the plaintiff can not recover.

(Asked for by defendant.)

No. 3.

The court is asked to instruct the jury that the duty that an employer owes to the employé is to exercise ordinary care in providing the employé a safe place in which to work; and what is ordinary care, is such care as men of ordinary prudence use in similar circumstances in the same employment.

(Asked by defendant.)

No. 4.

The court is asked to instruct the jury that there is no evidence to show that the construction of a culvert at the place where the accident happened would have avoided or would probably have avoided the accident.

5th. The court erred in instructing the jury as follows, to wit:

"There is, however, another matter, which stands in a different attitude, and that is as to the construction of the

road at the place where the accident occurred. There is testimony to show that the road at that place was built across the mouth of the gulch or draw, and, if I understand the testimony well, about upon the same level as the mouth of the draw, and that the gap which was made by the draw below the track and towards the river on the right hand side coming this way was closed up by the earth taken from the cut or, perhaps, by the sand which had washed down; and it would seem from all the circumstances detailed in evidence that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which the sand might have washed out towards the river, and in that manner obstruction might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think, from all that is stated before you, it is fairly open to this construction. Of course, that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track, and upon the quantity of sand and gravel coming down through the gulch; but, looking into all the circumstances as well as you can understand them from the testimony, if you are of the opinion that the track might have been built in this way, with reasonable expense, so as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place. It seems from the testimony that this track had been obstructed several times—I do not recall just how often—before this time, so that there was enough in the circumstances to call the attention of the company to the fact that there was danger from this source.

"It is true that in building its road, as a matter of duty towards persons in its service, the company is only required to exercise ordinary diligence and care, such care and diligence as men usually bestow upon business of the like nature; that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns.

"Then the question will be in your minds whether the road at this place was built with ordinary care and

diligence, with a view to the protection of the lives of persons in the service of the company.

"The rule is different when it comes to the case of a passenger; a passenger who is injured may complain of almost anything as a defect in the road and its structure, showing negligence on the part of the company.

"But in respect to persons who are employed by the company the rule is somewhat different, that is to say, there is a less degree of care and diligence required of the company in respect to the servants of the company, than is required in respect to persons traveling on the road in the capacity of passengers.

"So, then, gentlemen, if you are able to relieve the deceased in respect to saying that he was in the fulfillment of his duty, was performing well the duty which was required of him on the occasion, and that the company is negligent in respect to the manner of constructing its road, you may be able to find a verdict for plaintiff, otherwise for the defendant."

Also.

"Mr. Willard Teller—

"I would like to ask especially—referring to the question of this culvert—I would like to have the court charge the jury that there is no evidence, except that of Mr. Hall, in respect to whether a culvert would be safer or not, and that is an opinion of his, that he thought it would be safer; that is the only evidence in respect to it."

"The COURT: I believe that is true; I think that he is the only witness who testified in that way. I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters—that is to say, having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by witness—you, as men of some knowledge of affairs, may determine in your own minds, quite independently of Mr. Hall's testimony, whether it was practicable to make a culvert there with reasonable cost, which would have the effect to carry away the sand and gravel so it would not be an obstruction—I believe they testify to some rock coming down in the sand—whether it would carry it away so it would not be an obstruction upon the track."

Sixth. The court erred in denying a motion for a new trial, which said motion was as follows:

"Now comes the said defendant herein, and moves the court to set aside the verdict heretofore rendered herein, and to grant a new trial, for the following reasons:

"1st. Because the court erred in admitting incompetent, irrevelant, and immaterial testimony offered by the plaintiff against the objection of the defendant.

"2d. Because the court erred in refusing to admit proper, competent, material and relevant testimony offered by defendant.

"3d. Because the court erred in refusing to instruct the jury as requested by defendant.

"4th. Because the court erred in instructing the jury on its own motion.

"5th. Because the court erred in refusing to instruct the jury to find for the defendant.

"6th. Because the verdict is contrary to law and against the evidence.

"7th. Because the verdict is excessive.

"8th. Because the verdict is against the weight of the evidence."

III.

Taking up now, in their order, the six errors assigned above, and brifly pointing out the position which we take in each:

1st. The witness Hall, who had been a locomotive engineer on this road about eight years, or about the same time that O'Brien had been on the run, testified that rains are frequent in August and September in this region; that there are a great many cuts on the road; that most of the entire distance the road runs between the river and the mountain slope, and that, in rainy weather, on account of the steepness of the mountain sides, more or less sand is always deposited on the track;

that he had frequently found sand on the track in different places; that the engineer's duty, under the circumstances in this case, was to guard against sand, and not run through a cut of this kind without using more care than elsewhere; that witness himself had had his engine derailed at the same place seven years before by sand deposited there by a cloud-burst, and that there was always a liability of sand being on the track at a great many places on the road, which necessitated a great deal of care; that an engineer takes his chances on the character of the road and the country after a rain; that it requires him to be more careful; that he is apt to find more obstructions in rainy weather than in pleasant weather; that he expects stones and dirt on the track on a rainy day; that it requires a great deal of care and attention to prevent accidents; that a man coming down a canon with a train has got to run more or less chances.

It was, therefore, competent, relevant and material for the defendant to show that these things were matters of general knowledge and information to engineers on the road, and so, of course, to the deceased. It being impossible to show that the deceased himself had actual knowledge of these different facts, the defendant had a right to show a general knowledge on the part of the engineers along the road for the purpose of showing that sand deposited on the track when heavy rains occurred was one of the ordinary risks incident to the employment of deceased and which he assumed when he continued in that employment. The defendant had a right to show these things in order to show that it was an engineer's duty to be more than ordinarily vigilant in avoiding dangers at such a time and place, especially in view of the fact that no evidence whatever had been offered to show that deceased was vigilant and watchful on this occasion or even that he had a good reputation for care and caution, while on the contrary evidence was

afterwards offered by defendant to show that he was not in the exercise of due care, but had dozed off to sleep when the accident occurred.

We maintain, then, that it was error for the court to refuse to allow the witness to answer the question, "Are the engineers all aware of that fact?" In Wells *v.* B. C. R. and N. R. Co. (56 Iowa, 520), the judgment was reversed on the sole ground that "there was evidence tending to show the knowledge of deceased as to the dangerous condition of the bridge, etc.," and further on in the opinion: "It is, of course, understood that the knowledge of the intestate may be shown by circumstances, and inferred from his conduct. Direct proof upon these points is not required." In the case at bar there were no circumstances or examples of conduct by which inference of knowledge on the part of O'Brien might be made, and, no direct proof being possible, it was competent for the defendant to show, by the most direct proof obtainable—that of a fellow-engineer on the same run and in the service the same length of time—that the liability of sand being on the track at this point was a matter of generel knowledge among the engineers on that road.

Gates, Admr., *v.* So. Minn. R. R. Co., 28 Minn., 112.

2d. The plaintiff had alleged that at one time there had been a culvert leading from the gully under the track to the other side, for the purpose of giving an outlet to water and sand that might come down the gully. Of this there was no proof offered, and it may be assumed that no culvert did or ever did exist. Then to establish her allegation that defendant was negligent in the construction and maintenance of the roadbed, the theory is evolved that had there been a culvert there would have been no accident, and that the negligence of the defendant consisted in not providing a culvert.

The witness, Hall, having testified that in his opinion a culvert at this point would have added to the safety of the cut, it was competent and material for the defendant to show that this cut was constructed and maintained in the same way as similar cuts on this road and on other roads similarly situated were constructed and maintained.

As the court afterwards very properly instructed the jury: "In building its road the company is only required to exercise ordinary diligence and care, such care and diligence as men usually bestow upon *business of the like nature;* so that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns."

If, then, the defendant could show that this cut was constructed and maintained in the same way as cuts in similar places on this and other roads running through a like character of country, and that the same provisions for the escape of water had been made as the ones usually made, it would be evidence tending to show that it had done all that ordinary care and prudence required it to do. The one question which was given this jury to decide was "whether the road at this place was built with ordinary care and diligence," and it was error for the court to refuse to allow the witness to answer the question: "Is not that cut constructed there, and the water runs out of it exactly as the cuts are ordinarily constructed as roads running through such places?" The rule is so firmly established that no authorities in support of it are necessary.

3d. The court erred in allowing plaintiff's attorney to put to his own witness such leading questions as are contained in our third assignment of error. For the purposes of impeachment, it may have been competent for the plaintiff to bring out the conversation between their witness and the company's witness, but we know

of no rule of evidence that will allow the plaintiff's attorney to put into the mouth of his own witness the very words of a conversation, and ask him if such and such a question was asked, or if in answer to such and such a question such and such a reply was made.

4th. The third error assigned is that the court erred in refusing to instruct the jury as requested by the defendant. As we have said in a case recently heard before this court, and citing the same authorities, we understand the rule to be that the court is bound to instruct on every point of law relative to the issue to which its attention is called by either party, and is bound to instruct correctly.

Douglas *v.* McAllister, 3 Cranch., 298;
Smith *v.* Carrington, 4 Cranch., 60–62;
Pennock *v.* Dialogue, 2 Peters, 15;
Express Co. *v.* Kountze, 8 Wall., 353;
Seabury *v.* Field, 1 McAllister, 67;
The U. S. *v.* Fowler Packing Co., 1 Gilpin, 252;
Pitts *v.* Whitman, 2 Story, 620;
Nudd *v.* Burrows, 91 U. S., 439.

If the case is close, the instructions should be full and accurate.

Ill. C. R. R. *v.* Stafford, 67 Ill., 431.

To justify a refusal of otherwise pertinent instructions it must appear that those given sufficiently cover the case.

Railway Co. *v.* McCarthy, 96 U. S., 265;
Iron S. M. Co. *v.* Cheeseman, 116 U. S., 529.

We submit that instruction number two, asked by defendant, is not only pertinent, but absolutely necessary, to this case, and correctly states the law, and we also submit that nowhere in the instructions, as given, is the

question of an employé's assuming the ordinary risks of his employment touched upon or even hinted at.

Sherman and Red., Negl., 119 and 120, sec. 94 and notes;

Clark, Admrx. *v.* S. P. & S. C. R. R. Co., 28 Minn., 128;

Gibson, Admrx., *v.* E. Ry. Co., 63 N. Y., 449;

Wells *v.* B. C. R. & N. R. R. Co., 56 Iowa, 520.

In the last case cited an instruction similar to the one under discussion was asked and refused, and the case was reversed.

We also submit that the points in instruction number one, asked by defendant, correctly state the law, and are not covered by the instructions as given. It is elementary to the profession that the burden of proof is upon the plaintiff to show that an accident occurred by reason of the negligence of the defendant, and that the plaintiff was in the exercise of due care at the time of the accident, but it may not be to the laity, and the court is bound to give that instruction, at least. This the court failed to do. The court *did* call the attention of the jury to the fact that there was some evidence that the plaintiff was *not* in the exercise of due care and diligence, but it *did not* call attention to the fact that there was no evidence to show that the plaintiff was vigilant and watchful at the time, or that he ever had a good reputation for being prudent and careful, and it was, therefore, all the more necessary that the jury should be instructed that the burden of proof was with the plaintiff.

Dressler *v.* Davis, 7 Wis., 526.

Instruction No. 4, we also submit, should have been given. The allegation of negligence in having failed to properly inspect the track having been eliminated by the court, the only ground upon which the plaintiff was left to stand was the negligence of the company in con-

structing and maintaining this cut without a culvert. The only evidence that a culvert at this point would have added to the safety was the opinion of a locomotive engineer, and the defendant was entitled to an instruction that there was no evidence to show that the construction of a culvert at the place where the accident happened would have avoided or would probably have avoided the accident. But the discussion of this question we will leave until we come to discuss the instruction which was actually given on this point.

5th. We desire now to call attention briefly to the instructions which were given by the court on the question of the construction of the road and the maintenance of a culvert under the track through which water and sand might escape. Bearing in mind all the time that the only question which the jury had to decide was the negligence of the company in constructing and maintaining the cut as it did, we wish to call attention particularly to what the jury had before them on the actual state of affairs as they existed at that cut. Nearly all of the witnesses examined testified, as best they could, to the situation as they remembered it from casual observation, or from actual examination and measurement. No maps, plans, sketches, or photographs, were shown the jury, no view of the ground was had by the jury, and the only information or knowledge which they had was what they could gather from the conflicting stories and descriptions that were given them. The cut was variously estimated as being from 100 to 200 feet long, the highest bank as being from eighteen to thirty-five feet high, the lowest bank as being from nine to eighteen feet high, the distance between the track and the bottom of the embankment as being from eighteen inches—as alleged in the complaint—to three feet—testified to by witness Piccioli and witness O'Brien—to eight feet testified to by witness

Hall. The only evidence as to the distance of the river from the cut was that given by witness Hall, who said: "Should think the distance through to the river to be possibly seventy feet right opposite the opening," and that given by witness O'Brien, who said: "If a flume was put through there and run to give it a good fall, the very farthest it would have to cut through, twenty-eight or twenty-nine feet."

Nowhere is it shown what fall could have been given a culvert; nowhere is it shown whether it would have been built through sand or solid rock; nowhere is it shown whether it would cost $10 or $10,000; nowhere are a dozen things shown which the plaintiff was bound to show if she was going to charge the company with the duty of building and maintaining a culvert at this point, or if it was going to be left to the jury to decide whether or not the company was negligent in not having a culvert there. Yet, with nothing but this indefinite, meager and hazy picture of the cut before them, the court instructs the jury: "It would seem, from all the circumstances detailed in evidence, that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which the sand might have washed out towards the river, and in that manner obstructions might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think, from all that is stated before you, it is fairly open to this construction. Of course, that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track and upon the quantity of sand and gravel coming down through the gulch, but looking into all the circumstances as well as you can understand them from the testimony, if you are of the opinion that the track might have been built in this way, with reasonable expense, so

as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place."

And when the court's attention is called to the fact that there was no evidence in respect to whether a culvert would be safer or not, except the opinion of witness Hall that he thought it would be safer, the court says to the jury, "I believe that is true; I think that he is the only witness who testified that way. I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters—that is to say, having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by witness—you, as men of some knowledge of affairs, may determine in your own minds, quite independently of Mr. Hall's testimony, whether it was practicable to make a culvert there, with reasonable cost, which would have the effect to carry away the sand and gravel so it would not be an obstruction.

Our understanding of the rule is that, outside of the facts actually proved, the jury has no right to use the knowledge and experience they are supposed to possess, except such as they possess in common with the generality of mankind. It is true that evidence as to how an accident occurred need not be direct and positive, but may be shown from circumstances and presumptions; but we submit that no circumstances or presumptions are shown in this case from which a jury can say that the company was in duty bound to have a culvert at this point, or that it was negligence on its part not to have one.

Hart *v.* Hudson R. R. Co., 80 N. Y., 622;
Allen *v.* Willard, 57 Pa. St., 374;
C. B. N. P. R. Co. *v.* Pate, 21 Kans., 539;
Johnson *v.* H. R. R. Co., 20 N. Y., 65.

Cases in abundance can be found which even go so far as to say that the negligence of the defendant must be made out and established by the proof, and not be left to be inferred from circumstances.

Lehman *v.* City of Brooklyn, 29 Barb., 234;
State *v.* Phil., etc., R. R. Co., 60 Md., 555.

6th. Lastly, the court erred in refusing a new trial. If we are correct on the points already referred to, a new trial was a matter of strict right. Even if there were no error in the refusal to instruct, or in the instructions as given or in the rejection of testimony, we submit that the verdict is clearly against the weight of the evidence. The absence of any proof that deceased was in the exercise of due care, or that he was a careful man, the testimony of the fireman, who was with him, that it was his impression that O'Brien had fallen to sleep, the indefinite and unsubstantial testimony in regard to the culvert, attention to which has already been pointed out, all go to show that this verdict must have been based on something outside of strict proof or reasonable presumptions.

As we have pointed out, the error of the court in refusing to instruct as defendant requested, and in instructing as it did, was error sufficient to make it a matter of right to the defendant that a new trial of the witness be had. The rule is that, if error is made in giving or refusing instructions, a new trial must be given, unless the Record affirmatively shows that the party complaining thereof was not injured thereby.

Kelly *v.* Cunningham, 1 Cal., 366;
Richardson *v.* McNutz, 24 Cal., 339.

We respectfully submit that the judgment must be reversed.

JOHN F. DILLON,
JOHN M. THURSTON,
Attorneys for Plaintiff in Error.

DEC 5 1895
JAMES H. McKENNEY,
CLERK

BRIEF FOR DEFENDANT IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 119.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

NORA O'BRIEN.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

H. E. LUTHE,
C. S. THOMAS.
Atty's for Defendant in Error

FILED MAY 13th, 1895.

(15,040.)

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THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

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In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

In this case the defendant in Error has filed her motion to dismiss the Writ or Error. And to affirm the judgment of the Circuit Court of Appeals according to the rules and practice of this court.

The grounds of this motion is on the grounds that the appeal herein has been taken only for delay. And that there are no questions of Federal Jnrisdiction in this case, none litigated in the court below, and no jurisdictional fact involved in the

cause except that the corporate existence of plaintiff in Error is established by on Act of Congress, concerning the constitionality of which there is no controversy or action of any kind in the Courts below or in this Court.

In such case it is decided in—

The Northen Pacific R. R. Co. vs. Ainoto, 144 U. S. Rep. 465.

That where there is color for the motion to dismiss, and the writ of error is taken for delay only the Judgment will be affirmed.

In this case it is certainly manifest that the question upon which the Jurisdiction depends is no frivolous as not to require further argument.

See rule 6, clause 5 Sup. Ct. Rules.

We respectfully submit the following argument and brief in behalf of the Defendant in Error on the merits to show that the said writ of error was manifestly taken for the purpose of delay only and that the judgment of the Court below should be affirmed.

STATEMENT OF CASE.

In September, 1890, John O'Brien, the husband of the defendant in error, was in the employ oi the Union Pacific Railway Company as a locomotive emgineer, running an engine upon the South Park division of the company's line.. By a derailment of his engine on the 4th day of September, 1890, the said John O'Brien was killed, and

the present action was brought by his wife to recover damages therefor.

The evidence shows that the accident occured about one o'clock in the morning of the day named at a place known as Platte Canon, the deceased being in charge of an engine which was propelling a train of freight cars, some twenty-three in number; that the line of railway is built along the South Platte river, and of neccessity there are numerous cuts thereon, caused by the intesection of the line with the spurs projecting from the high lands along which the line is built; that the engine was, derailed by reason of sand and gravel which had been washed upon the track to the depth of some six inches and to a width of about fifteen feet, that this deposit of sand and gravel was in a cut, the river bank of which was six or eight feet high, the other bank being much higher and sloping up the side of the hill or mountain; that on the hill-side of the cut there was a gully running back for some distance, which in times of rain would bring down sand and other material, that there was no opening or culvert under the railway track through which the water and material brought down by it could escape: that there was alongside the roadbed a small gutter, but, if the water coming down was greater in quantity than this ditch or gutter would carry away, then the surplus would run over and upon the tracks and rails of the railway; that during the evening preceding the accident, rain had fallen and the water, rushing down the gully named, had carried the sand and gravel upon the

track to the extent already stated.

The case was sent to the jury upon the issues of negligence on the part of the company, in not properly constructing the track, in that no outlet was provided for the water which would be liable to come down upon the track and deposit thereon sand and other obstructions, and of contributary negligence on part of deceased; and upon both issues the jury found in favor of the plaintiff, assessing the damages at $3000, and judgment being entered upon the verdict, the company brings the case to this court.

The first assignment of error is not well taken and the point made by counsel is not supported by authorities cited by them, nor are we aware of any authorities establishing such a rule of evidence. The question asks the witness Hall to testify, not to a fact, but to a conclusion which he himself must have deduced from the faats of the case, viz: that because he—witness—had in the company's service at various times found sand on the track, and once only, seven years before the accident in question, had fouud sand at this particular place after a clond burst, and was derailed, that all the other engineers upon that road must know of such occurences.

The question is not, "did deceased know it?" To such question another could be put, "how do you know deceased knew it?" The object of the question and the efficiency of it was, and could only be, to obtain either the witness's conclusion that all engineers knew it and among them the deceased, from

the circumstances of the case, which was clearly for the jury to determine, and not for the witness. Suppose, to prove the defendant's knowledge of this particular bad condition of the road, plaintiff had asked witness Hall, after his statement of the freqnency of sand deposits in different localities of the road for a long period of time, whether the fact that sand was washed upon the track, or likely to be, at this particular place, was generally known to all the officers of the company? And the question had been allowed over the objection of defendant, would not defendont urge this strenuously as a most palpable error? And so it wonld be. Yet the principle would be the same in both instances. The jury would not be warranted in presuming from the fact that sand was found there once, twice, three or four times in as many years that deceased must have known it. How then could the witness be allowed to guess at it?

The case cited, Wells vs. B. C. & N. R. Co. 56 Iowa 520, is doubtless good law for the case, but it has no bearing on this case.

The second assignment predicated of the exclusion of testimony elicited from same witness, as to whether this cut was not constructed as such cuts are ordinarily constructed upon roads running through such places, is not well taken, nor is the rule "so firmly established" that it needs no authorities. No authorities can be produced to establish such a rule.

Counsel no doubt has in his mind the rule that injuries caused by machinery or instrumentalities

so constructed, that while they are not so safe as others that are better contrived, that is, not the best improved agencies in existence, yet such as are commonly used by others for a like pnrpose, then such ordinary use can be shown. But that is not this case. The question here is, was this a defective and dangerous construction of this road? Could it have been, with moderate expense, made safe? In other words, did the company omit to do in the premises what, in justice to its employes, it ought to have done? If so, it was negligent, and the conduct of any other road will not relieve defendant from the discharge of this duty."

See opinion of Shiras J. where the question is so clearly discussed that we cannot add to it. One view of the question, however we think, may not have been touched by the court; and that is, the question asks: "*is not that cut constructed there and the water run out of it exactly as the cuts are ordinarily constructed on roads running through such places?*"

The manner of constructing the "*cut*" is not the question of this case—nor, the running of the water out of cuts; the question is, is the road constructed over and across a water way? If the question could be at all admissable, it should ask, how other roads are constructed over such water ways by the company that are known to carry water and sand and gravel sufficient to derail trains. If that question had been asked it would probably not have been objected to. It would have been indifferent to plaintiff how the witness answered

that question, for if he answered "no," or "don't know," it would do plaintiff no harm, and if he answered "yes," the jury would not have believed him, or if they did, it would only prove that other roads were grossly negligent and indifferent to the lives of their employes. But the question is ambiguous, and so worded as to elicit an answer which might be true as to the witness, but false to jury.

To the third assignment of error we only answer that the impeaching testimony was conducted in conformity to the well-established American rule. Counsel say they know of no such rule.

1 Greenleaf on Ev. p. 477, sec. 434.
2 Best on Ev. sec. 642.
1 Thompson on Trials, sec. 360.

Phil. on Ev. has an expression modifying this rule somewhat.

Besides, to permit leading questions is in the discretion of the court, and is not reversible error unless palpable abuse of such discretion.

1 Thompson on Trials, sec. 357.

The error assigned for refusal of the court to instruct, as prayed by defendant.

Instruction No. 2, asked by defendant and refused by the court, calls for the application of the rule of ordinary risk incident to the employment, but the instruction does not state it correctly, even if the rule applies to this case.

It assumes that if it appeared in the evidence that if in the *country through which the road ran,*

and its location was such that sand was frequently deposited on the track, then such obstruction must be taken as one of the ordinary risks of the employment.

The question of extraneous causes producing such conditions of the road at the particular place where the accident occurred, existing through the negligence of the defendant, is entirely ignored in this instruction. It conveys to the jury the idea that if sand is frequently unavoidably deposited upon the track in different localities along the line of the road without the fault of the defendant from the very nature of the country, then the defendant is absolved from obligation to prevent such obstructions in the place where the accident occurred; although the sand there was carried down by a draw or gully coming down the mountains for a long distance, at least a mile, according to the evidence, with sloping hills on either side, while at other places, according to the evidence, sand was washed upon the track from the mountain slopes immediately above the track.

In the one place the defendant could and should have guarded the track, in the other it was unavoidable. Yet in this instruction the dangers arising from the faulty condition of the road are blended with and placed upon the same footing of dangers not so arising. It says, in effect, that as plaintiff must assume the hazard of a dangerous road, he must also assume the risk of defendant's negligence.

But this instruction ends as an instruction of

contributory negligence, and does not distinctly ask the court to instruct on the rule of accepted risk, or a waiver of defendant's negligence.

Now the question arises: first, was the court asked to instruct on the law as to ordinary risk? And, secondly, did the evideuce warrant such instruction?

Unless asked to so instruct, according to defendant's authorities cited in its brief, the court was not obliged to instruct. The above instruction we claim asked for an instrnction on contributory negligence, and was fully covered by the court's in strution *sui sponte,* (side pages 32 and 33 record.) And it does not distinctly ask for an instruction on the law of ordinary risk.

But if it does, the evidence does not warrant such instruction. There is no element of ordinary risk here, nor of a waiver of dofendant's negligence.

The later and soundest exposition of this doctrine is, that not under all circumstances of defect known to the injured employe is an undertaking of the risk presumed. The rule is that the injured employed must not only know the *defect,* but he *must unaerstand the risk or danger arising from such defect.*

Railroad Co. vs. Smith. 45 Ill. 197.

Language of the court is: "The peril consisted in defective construction of the road in its appurtenances its culverts and bridges, which its fireman could know nothing about, and which he

could not have discovered by the exercise of ordi nary precaution and prudence. Indeed he was not required to know anything about that: the implied undertaking of his employer, that the road and culverts and bridges were properly constructed, and safe for passage of trains, was sufficient for him. He embarked in its service on the falth that it was a properly constructed road, aod that his superiors were in the exercise of all dilligence necessary to keep it in good repair. * * There is no rule better settled than this, that it is the duty of the R. R. Co. to keep their road and works and all portions of the track in such repair, and *so watched and tended* as to insure the safety of all who may lawfully be upon them, whether passengers, servants, or others They are *bound* to furnish a safe road, and sufficient and safe machinery and cars."

St. Louis and F. Scott vs. R. R. Irwin, 16 Pac. 146.

A case where conductor of freight train was injured by standing on caboose, the braces of overhead timbers of bridge striking him, they being too low. He had passed under the bridge twice a day for three months, but not standing on the car; he knew of the overhead timbers of the bridge.

Court held that it does not necessarily follow that he was acquainted with the proximity of the braces to the top of the car. When he entered the seryice he assumed the ordinary risks, etc., etc.

"That law, however, does not require that an employe shall know of all defects or obstructions

that may exist on the road or in the service in which he is engaged, and it cannot be said that the peril in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty and placed its track in such condition that he could perform his duties with reasonable safety."

Other cases holding tnat employe must know not only the defect, but the danger, and that employer and employe do not stand on the same footing in this respect, and which are analogous to this case, are.

Wuanatilla vs. Duluth Lumber Co. (Minn.) 33 N. W. Rep. 551.

Smith vs. Peninsular Car Works, (Mich.) 27 N. W. Rep. 662.

Rummell vs. Dillworth, (Pa.) 2 Atl. Rep. 355.

Russell vs. Minn. & S. L. R. Co.. 20 N. W. Rep. 147.

Colbert vs. Rankin, (Cal.) 13 Pac. Rep., 491.

Cook vs. St. Paul W. & M. Ry. Co., 24 N. W. Rep. 311.

McGowan vs, La Plata Mining C., 3 McCrary, 397; S. C. 9 Fed. Rep. 816–861.

Sherman Admrtrix. vs. Chicago N. R. Co. 25 N. W. Rep. 593.

Knapp vs. Sioux City R. Co (Ia.) 32 N. W. Rep. 18.

Also

Doyle vs. Baird, 6 N. Y. Supplement.

Shearman & Redfield on Negligence, § 95; 34 Minn. 45.

Magee vs. Northern Pac. R. Co., 21 Pac. Rep. 114.

Miller vs. Union Pacific R. R. Co., 17 Fed. Rep. 67.

Gilmore vs. Northern Pacific R. R. Co., 18 *ib.* 867.

The evidence in the record on this head is that the defect in question consisted of a run or draw running in upon the track coming from a great distance in the hills, more than a mile. It was viewed for a mile by witness O'Brien, and its source was still further up and beyond reach of the eye. This run had had its outlet into the river about seventy-five feet from the track. The track was constructed across this draw, near its mouth, and where the track intersected it there was a cut and a curve, the outer side of the curve being towards the draw, where it entered the cut. On the inner side of the curve the gully was filled up nearly to the level of the bank of the cut. The track in the cut and curve was nearly level, so as not to permit an off-flow of water readily and no means of escape of sand washing in upon the track. The draw, however, viewing from the track did not appear dangerous to the ordinary observer.

"It is not much of a gully there, then—just a little light wash. You could not call it a gully hardly. Never went up that gully to find out how it was beyond." (Testimony of witness Bennick side page 15.)

"Know the gully, but don't know how far it runs up into the mountains; never examined it; might probably see 150 feet or so up it; the mouth of the gully, where water comes in on the track, is pretty nearly level, maybe 2 feet higher than bed of track: * about 6 or 7 feet wide where sand comes in." (Testimony of Con. Sullivan, side page 17 record.

"Standing at the mouth of the gulch and looking in from the track, you can see into that gulch probably 50, 75 or 100 feet; beyond that mountains obstruct it. That stream comes down, runs crooked, goes up and passes around the mountain here. Walked up the gully or run about a mile; three-quarters of a mile it goes up in here, turns around, comes back again; it is entirely hidden; the mountain slopes. There is another canon comes in here to the left." (Testimony of O'Brien, side page 23 record.

"It was a narrow gutter, one that ought to be attended to; would call it a gutter: should suppose it to be a run, more like." (Testimony of McLanahan, fol. 20.)

An extensive gully, he means that an extensive gulch, is drained into the cut; the width of the gulch at the mouth narrows down to a little opening about 10 or 12 feet, wide, but the mouth of the gulch outside the cut is from 100 to 150 feet wide; can't tell exactly: can see a long distance up the gulch from the canon, looks as if water would come from' at least, a mile back, then there may be some other ravines, though the slope generally has the appearance of coming down into this place. You can see 300 feet or more standing on the engine, should think from casual observation that water

would come from as much as 300 feet. Does not think that his observation is any better than other winesses who testified 25 to 50 feet. (Testimony of witness Hall, side page twenty record.

The above is substantially all the testimony of the appearance of the defect from the point of observation of the deceased in his life time, provided he ever saw it in the daytime, of which there is no evidence.

Even if deceased could have indulged in speculation as to the probable length of this draw back into the hills, he would be as uncertain as to whether this rnn beyond 300 feet from the track—taking Hall's estimate—was not intercepted by other ravines that would draw off the waters drained into the gully beyond. Of the topography of the country beyond the point of vision, deceased could have known nothing without following it up and exploring the country. The country was hilly and the gully winding and the water sheds beyond the reach of the eye up the gully, a mere matter of conjecture even to a close observer. Under such circumstances deceased had a right to rely upon the defendant having carefully investigated the ground beyond and carefully weighed the danger arising from the rains in that region, and to accept the existing conditions in tnat respect as a guarantee from the company that there was no danger to be apprehended from that gully. And we think authorities herein cited fully bear out this view.

There is no evidence that tends to show that deceased knew of previous obstructions at this place, or that as a prudent man he should have known it. The frequent deposits of sand on the

track at many places did not make former deposits of sand at this place a conspicious circumstance; indeed the accident which happened to witness Hall at that place a few years before, was not even known to Con Sullivan, the section boss of the adjoining section. He only knew of sand there once when he found it there, and shoveled it off, though such a thing occurred sevaral times.

Therefore we contend that there is no evidence of acceptance of the risk upon which to base such instructions.

If under the evidence the jury had returned a special verdict, answering the question whether deceased knew of the danger, that he did; the verdict would be against the evidence, and could not stand; and if therefore this element in a general verdict had infiuenced the jury to return a verdict for defendant, the instruction should not be given.

Instruction 1, asked by defendant, was covered by court's instruction to jury. The instruction given on contributory negligence and on negligence was unusually clear and strong ror defendant. They were told if they believed from the evidence that deseased was asleep at the time or inattentive to his duties' plaintiff could not recover; but submitted the credibility of the witness Warnick to the jury.

We don't understand the rule to be that plaintiff must prove by a preponderance the care and attention of deceased, or to prove the negative of contributory negligence by any certain quantum of proof. The plaintiff proves that the injury was cansed by the negligence of defendant. If it was caused partly by negligence of deceased—in case of

master and servant—in legal effect it was not the negligence of the master.

The negligence of the company was the burden of plaintiff's proof; but beyond proving that deceased was at his post of duty, in a position to act, and apparently exercising care, it is not necessary for plaintiff to prove. This makes prima facie proof of his diligence, and that defendant's negligence only, produced the injury. After this the burden of proving contributory negligence is upon the defendant. After prima facie proof by plaintiff, the burden of proof shifts to the defendant.

Johnson vs. H. R. R. Co. 20 N. Y. 65.

But if it be conceded that the instruction asked was a proper one, how was the defendant injured by its refusal? The jury was charged that they must be able to say from the evidence that deceased performed well his duty on this occasion, and was without fault himself, before they could find for plainsiff. There is not such pointed significance to a juryman in the words "Burden of proof" that it may not be made clear in his mind by some other language. When they are told that plaintiff must show that deceased was without fault; did not contribute by his negligence to the happening of the accident; and that unless they can so find from the evidence plaintiff cannot recover; this language instructs more clearly to the minds of ordinary men that plaintiff has the burden of proof. And plaintiff made the proof, and it consisted in showing that John O'Brien was at his post on his side of the cab, face turned towards the wiodow: that he had one minute before released air: that on entering the cut, wihin 50 feet of the obstruction, he pulled the lever, putting on steam to drive the en-

gine through the cut. This is all that could be shown, and all that is necessary. Opposed to this there is no testimony but the fireman's which the jury rejected. This question was fairly submitted to the jury and determined by them. And here may as well be added comments on the sufficiency of the evideuce on this head to sustain the verdict.

McLanhan testified that deceased was on the engine; that air was released by the engineer 500 to 800 feet before reaching the cut: that the engine commenced to work steam as it entered the cut 90 feet from the obstruction; that, when the accident occurred, there was a sudden checking of speed, and shortly thereafter, a sudden stop, indicating that air-brokes were being used by deceosed. (See record, side page 13)

Hall testified that air had to be used about 800 feet from the cut; that often and generally, steam had to be used to overcome the curve and slight grade in the cut; that the obstruction could not be seen from the engine more than 50 feet away; that in daylight seven years before, while running a passenger train, though exercising great care, his engine was derailed; that he could not stop in time that it was a sharp curve 28 degrees; that an engineer cannot run so slow or timid as to avoid these accidents and still make time. (Side page 20)

Renicke testified that steam had to be applied in propelling a heavy freight train through this cut; that air had to be released before reaching the cut; that the curve was sharp, and the obstruction could be seen only 20 or 25 feet away; that trains could not be stopped, but engineers were compelled to run through the sand: that he had run through

it there because he could not stop, but was always lucky enough not to be derailed. (Side page 15.)

Defendant's witness Warnick testified that from the time he saw sand, and he was looking out of the window at the time, he had time only to jump from his seat to the tank—a step or two—an inappreciable space of time, not longer than it would require to shut off steam, work the air-brake and reverse the engine. (Side page 26.)

Against all of this is only the absurd testimony of Warnick that deceased was asleep; that he was motionless, did not act; that his head all this time drooped, as if asleep. All this Warwick saw while he himself was making a jump for his life. Under such circumstances, and with contradictory statements made by him at oiher times, the jury could not accept his testimony.

The two last assignments of error are on the ground that the evidence does not support the verdict, and that a new trial should have been awarded, and that the court,s instructions on that question was erroneous.

This proceeds upon the assumption that the evidence of negligence was not sufficient, and the evidence of absence of contributory negligence was insufficient; the latter we have already discussed.

As to the negligence of the defendant appearing from the evidence, not much need be said. We submit that the evidence in question is full and strong, establishing a case of gross negligence, and a disregard for the lives and limbs of the defendant's employes. A road bed and track is laid in a deep cut and curve across a gully, without an outlet. The gully that had theretofore carried its

waters tnd sand to the river, was intercepted by this road, and the outlet banked up on the opposite side of the track. Upon a slight exploration of the country towards its source, it was easy to discover that a mile beyond an extensive area of sloping hills were drained into this gully; that the nature of the soil was such that sand and decomposed granite would be carried down into the gully by rains: that the stream when swollen by rainfalls ran through beds of sand; that the fall of this gully was so great as to cause the waters to leap down its steeps, carrying its freight of sand and gravel into this death trap.

And yet, ordinarily, when the elements were peaceful, this "narrow gutter" (could not call it a gully hardly), wore a harmless and serene aspect as it lay hidden from view to approaching trains. A more insidious lurking foe to human life could not have been suffered to lay in ambush there.

Counsel argues that there is no evidence as to the cost of a culvert, whether it would be $10 or $10,000. All witnesses testify that it was sand and gravel there; that the cut was earth and gravel; not a word of testimony that the banks were of rock. Even if it were rock, any person could estimate the expense of a colvert. It was not to expensive to make this extensive cut there. Could it be said that it would be too expensive to make it a safe cut? The cut is through a spur in the mountains, sloping down to the river with a steep decline A 28 feet long culvert would obtain a good fall. (O'Brien's testimony Hall's testimony. Not only a culvert would have carried off the sand that was deposited on this track, but even a pit sunk at the mouth of the gully would have held the sand that

caused the accident. The amount of sand on the track was six inches deep at the deepest point, and from ten to fifteen feet long, extending across the track. An ordinary culvert of 3 feet by 4 feet would nave received and held all this sand, even if it failed to carry any of it through. The same force of water that made the gully, and that carried the sand down the gully, would carry the sand through the culvert, that would, if constructed right necessarily lay on the same slope as the original bed of the gully; and as the mouth of the gully was some eight feet distant from the track, and about two feet above the level of the track' a decline could have been obtained for the culvert that would easily have permitted the sand to go through.

The language of Justice Lamar, in Gleason vs. Virginia & Midland R. Co. U. S. Supreme Court Reporter, July 1891 number, book 35 p. 461, on the question of negligence in constructing cuts, the care required and that which is unavoidable as distinguished from negligence, fully supports the verdict.

No expert was necessary to determine that, and the court was right in instructing the jury that they were competent judges of this matter, and could use their own judgment and their own experience and observation in determining it. The jury did so ane it seems to us, conformably to the facts, and their verdict ought to be conclusive.

It is plainly evident from an examination of the record that the questions to be decided have already been decided repeatedly in this Court, that the jurisdictional question or Federal question in this case is only incidental and that the writ of error is only taken for delay.

In view of these circumstances the case having already been tried and considered on review once all by able courts, that the judgment should be affirmed and that the Defendant in Error should be compensated for the extra expense trouble and delay an allowance py this court of ten per cent damages according to law, and rule of this Court.

Respectfully, Supmitted,

H. E. LUTHE,

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Atty's for Defendant in Error

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